109-641

Supreme Court of the United States

No. 136. October Term, 1883.

WILLIAM E. CLEMENTS, *Appellant,*

vs.

THE
ODORLESS EXCAVATING APPARATUS
COMPANY.

Brief for Appellant.

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PHILADELPHIA:
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1883.

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STATEMENT OF THE CASE

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland, by W. E. Clements, appellant, against whom a decree in equity for the payment of one thousand four hundred and sixty-six (1,466) dollars and fifty (50) cents, and costs, and a perpetual injunction, has been entered, at the suit of the Odorless Excavating Apparatus Co., appellee, and complainant below. The bill is founded on Reissued Letters Patent of the United States, No. 6,962, dated February 29, 1876, granted to Lewis R. Keizer, as assignee by mesne assignments of Henry C. Bull, the inventor, and to whom the Original Patent was granted, June 6, 1871, for an apparatus for cleaning privies. The bill charges infringement by appellant of the first and third claims of the patent, in the use of an apparatus bought of parties who made and sold it under Letters Patent granted to Scharf & Bradley,

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dated July 18, 1876, and Letters Patent to S. R. Scharf, dated January 12, 1875; and by the decree the appellant is perpetually enjoined from using the same, and is decreed to pay a large sum of money as damages, with the costs of suit.

The answer contains a denial of infringement, and charges that the patent is void for want of novelty; that the reissue is void as not being for the same invention for which the original was granted, as containing new matter and an unwarrantable expansion of the claims of the Original Patent. The answer also sets up former patents and publications showing all the substantial features of the patented device in the same combinations many years prior to the date of the alleged invention by the patentee Bull; and appellant supports his denial of infringement by the production and proof of Letters Patent for the precise device used by him, granted to or owned by the parties from whom he purchased the said apparatus.

SUBJECT MATTER OF THE PATENT.

Apparatus for the odorless cleaning of privy-vaults have come into extensive use in the United States within the past ten or fifteen years, superseding the old mode of cleaning by bucket and shovel, and the essential elements of such apparatus consist of a pump, a receiver, and a deodorizer. Many patents have been granted in the United States for various forms of such apparatus, all of which necessarily include these three elements. They followed the introduction of the same system in Europe, evidenced by three French Letters Patent—Cherrier, dated Dec. 27, 1844, (see pp. 187, 190, 240, 242 of record); Lesage, dated Dec. 11, 1855, (see pp. 192, 197 of record); and Courdier, dated May 22, 1860, (see pp. 166, 167, 216 of record). The system in the United States is shown in the patents beginning with Straus, dated January 28, 1868, (see page 204 of record); followed by Walter, dated

May 6, 1874, (see page 201 of record); Bull, of June 6, 1871, (see page 29 of record); Scharf, dated January 12, 1875, (see page 177 of record); Frazier, dated October 5, 1875, (see page 183 of record); Bradley & Scharf, dated July 18, 1876, (see page 180 of record); and others not necessary to be considered. Some of these machines operate on the "forcing" system, that is, the matter is lifted by the air pump and *forced through it* into the receiver; and in this category are embraced the Lesage, Courdier and Straus; all the others mentioned above operate on what is known as the "vacuum" system, that is, the air pump creates a vacuum in the receiver, into which the material is drawn by atmospheric pressure. It is on this latter principle that the appellee's device, as well as the appellant's apparatus, are constructed and operate. It seemed to be important that the receiver into which the material was forced or pumped should be of convenient size and form to enable the material to be carried away in the receiver without re-transfer into another receptacle; and an examination of these patents shows that all the patentees had this desideratum in view in the construction of the receiver, some mounting it on wheels, others making it small and in the shape of a barrel or cask. It was not material whether the deodorizer (which contained either chemicals or burning charcoal) was put upon the pump or upon the receiver. It is apparent that the character of the pump, at least so far as respects the machines operating the vacuum system, was not material, any ordinary air exhaust pump being all that was necessary. Suitable pipes, tubes or similar connections between the pump and the receiver and the vault to be cleaned complete the apparatus, in its absolutely essential features. Check valves, float valves, sealing caps, hoisting apparatus, special means for adapting the apparatus to particular uses, and other attachments were added to some of the machines, and which will be fully discussed hereinafter, so far as they appear to be material to the issues involved.

The record discloses that the appellee is a corporation, owning at least two of the patents mentioned, viz.: Straus', which operates on the "forcing" system; and Bull's (the patent in suit), which operates on the "vacuum" system, and have put the former into extensive use, though few, if any, of the latter have ever been made or used, so far as the fact could be proved by negative evidence, and not denied. (Testimony of Boyle, page 104 of record, Bradley, page 109.) The appellant, on the other hand, is one of a large number of persons in the business of cleaning vaults, who have been sued for alleged infringement of the Bull Patent, in the use of apparatus manufactured by and purchased of one Jerome Bradley, who constructed it under and in accordance with two several Letters Patent, above-mentioned, granted to J. Bradley and to Scharf & Bradley; both of these patents involving the same general features of construction and operation. And these machines, made by Bradley, the record shows (page 109), have come into extensive use, and are formidable competitors of the appellee's "forcing" apparatus of the Straus Patent.

The apparatus exhibited in the drawings of both the Original and Reissued Bull Patent (see pages 29 and 31 of record) is described in the former as consisting of a vault, a cask having an induction passage and funnel at its lower end, with a check-valve, for closing the passage; an air-opening at its upper end, with a float-valve; necks, for sealing caps, at each passage, and shoulders, for suspending it; an air-pump and a deodorizing furnace. And these elements were fully and clearly described in that patent, and comprised within two combination claims—the second being the same as the first, including the vault and pump as additional elements. The Reissued Patent, with the same drawings (and a certified copy of the model filed in the Patent Office shows it to be fully and correctly delineated in both drawings), contains a very different description of the same apparatus, the language of the original being so changed and added to, that it conveys a wholly different

meaning and imparts a different understanding of the scope and character of the alleged invention. And this description is followed by three claims, two of which, standing alone, and read in connection with the *original* specifications, could scarcely be recognized as belonging to that patent; the second only (which it is not pretended that the appellant has infringed) being substantially one of the claims of the Original Patent.

THE ISSUE.

Upon the first and third claims of this Reissued Patent the issue of infringement was made. These claims are as follows:

"1. A privy-vault cleaning apparatus, consisting of an air-"pump, a deodorizer, and suitable tubular connections, in "combination with an independently movable receiving-cask, "having an induction passage or opening, and also an air-"opening for connection with the air-pump, and provided with "screw-necks at each opening for receiving sealing-caps or "covers, substantially as described, whereby the movable cask "may be located in any desired position with relation to the "vault and privy, and the pump and deodorizer located in "any desired position with relation to the vault, privy, and "cask; and also, whereby the casks, when filled, may be "handled as is usual with filled casks, as set forth."

"2. The combination with a portable night-soil cask, of a "float-valve located at the air-passage, substantially as de-"scribed, whereby the fluid-matter is prevented from entering "the air-passage, and clogging the suction air-pipe and pump, "as set forth."

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& Scharf Patents. *Prima facie* therefore, there exists a patentable difference—so adjudicated by the Patent Office in granting the patents for it—between it and the apparatus patented by the reissue in suit. To sustain the charge of infringment the appellee called Henry B. Renwick as an expert, in whose hands the Reissued Patent and the model of appellant's apparatus was placed. The latter was so very much unlike the Bull apparatus, as shown in the drawings of the patent, that it became necessary for the expert to explain and argue, (to bring it within the claims mentioned,) that the Bradley receiver, which cannot be lowered into a vault, and which is to be used and filled while standing on end, with induction and eduction passages at its upper end, and a single valve to the eduction passage only, was the same as the Bull cask, intended, as shown, to be lowered into a vault, and so constructed with an induction passage and a flap valve (without which it could not be operated), an air opening at its upper end, necks for caps at each end, and shoulders or lugs for suspending it. And, further, that the rigid funnel (called for the first time "a tubular connection" in the Reissued Patent) affixed to the bottom (and it must necessarily be at the bottom) of the Bull cask was to be so understood and read that it might mean a hose capable of being lowered into the vault and connected with the *top* of a cask which had no induction passage at its *bottom* and no flap valve, and was intended to be, and is only capable of being, operated outside the vault. In short, that the Bull cask, which bears no external resemblance to the Bradley receiver, and was, as is plain at first sight, constructed, and intended to be operated in an entirely different manner, must, under the stress of the strong words "*independently* movable receiving cask" (found for the first time in the Reissue Specification) be held to be embraced within those exceedingly flexible words. But the value of this opinion of the appellee's expert is to be determined, to a great extent at least, by what is found on examination of the history of the art, and it discloses that the French Patent of Cherrier and the United States Patent of

Walter, both operating on the vacuum system, not to mention the Lesage, Courdier and Straus Patents, operating on the "forcing" system, show all the same essential elements of an odorless excavating apparatus, in substantially the same combination, for the same identical purpose; viz.: a pump, a receiver, a deodorizer, and tubular connections. The construction to be given to these claims of the Reissued Patent will, of course, be controlled by the state of the art at the date of the original patent.

The issue of novelty was raised in the answer, and the prior patents, together with publications and proofs, were put in evidence by the appellant. These go so far as to necessarily overthrow the appellee's patent if it is construed broadly to cover any combination of the elements last above mentioned, in which the words "independently movable" can be applied to a receiving cask of a vault cleaning apparatus; but if the newly inserted and flexible terms of the amended description and the Reissue claims are construed to apply only to the special construction shown in the drawings and described in the specifications, as they must necessarily be to save the patent, then it will be conceded that they do not anticipate the first and second claims of that patent; though fully anticipating the third.

A distinct issue was raised by the answer as to the validity of the Reissued Patent. It is averred to contain new matter and a wholly unwarranted expansion of the claims of the Original Patent, and, in brief, to be for a different invention from that for which the original was granted. Aside from the ground that, as the reissue is for expanded claims and subcombinations, it could not lawfully be reissued, after a delay of five years, to cover by sweeping claims, apparatus such as used by appellant, and various useful modifications and improvements patented in the meantime, which confessedly the original claims and description of invention would not and could not be construed to include.

An additional issue was raised affecting the validity of the reissued claims alleged to be infringed, viz., the first and third, that the first was void, in that it did not embrace an operative combination; and the third, also, for that the float valve being old, there was no invention or patentable novelty in locating it in a portable night soil cast at its air passage, over combining it with a cistern, or with vessels to which steam whistles were attached, or vessels containing water-induction passages, all of which were proven, and indeed were well known to be, old.

Proofs were taken under all these issues, consisting, *inter alia*, of prior patents and publications, testimony of witnesses as to prior use, the Original Bull Patent, a certified copy of the model filed in the application, the file and contents of the application for the Reissued Patent, the testimony of experts, and the patents under which appellant's apparatus was constructed.

INTERLOCUTORY AND FINAL DECREES.

The case having been heard on the pleadings and proofs, an interlocutory decree was entered in favor of the complainant, sustaining the Reissued Patent, and finding the fact of infringement against the appellant. Thereupon a perpetual injunction was awarded, as prayed for in the bill, and the cause referred to a Master, to take an account of profits and damages. (For decree, see page 266 of record, and the opinion on which it was based, on page 265.)

As matter of information here, this opinion is of value only in stating the conclusions of the learned Judge on the question of *novelty* of the subject-matter of the claims; the other defenses, viz.: the validity of the reissue and the question of infringement, being disposed of in a few lines, in a general way, based on a prior adjudication, without reconsideration under the new light and additional proofs herein adduced.

Before the Master, profits were waived and damages asked for, based on a royalty or license fee for the number of loads of material removed by such apparatus. Upon the testimony offered, the Master reported as damages the sum of $1,446.50. It seems that the defendant failed to file any exceptions to this report, or did not file them in due season; and on August 2, 1880, a final decree was entered (see record, page 279), confirming said report of the Master, adjudging to the appellee the said sum so found as damages sustained, with costs, and awarding execution therefor; whereupon appellee prayed for an allowance of an appeal, which was granted, and the injunction suspended pending the same, upon the entering of security.

ASSIGNMENT OF ERRORS.

The opinion of the Court below, on which the interlocutory decree for an injunction and account was based, treats only in detail of the question of novelty. It supports the reissue on the strength of a previous adjudication by another Judge, without stating any reasons, and, having sustained the broad claims, necessarily solves the question of infringement in the affirmative.

First.—The learned Court erred in broadly construing the first claim of the Reissued Patent, which is for a combination of the several elements therein mentioned, viz.: a pump, a deodorizer, a movable receiving cask with induction and air openings, with valves to the same, and screw-necks, and suitable tubular connections, all of special construction, and peculiarly arranged and combined, to be for a combination of *such* parts, whether the pump was attached to the deodorizer or not; whether the receiving cask had a check valve, or any valve, at the induction opening; whether the receiving cask was differently constructed and operated, or not, so that it was separate and *movable*, in contradistinction to a cask which, though movable, was not separated from the pump; whether the cask

was intended to be lowered into the vault, or operated outside of it (though it is evident on mere inspection that a receiving cask must be differently constructed in several material respects if intended to be lowered and used inside a vault from what it would be if used outside); whether the rigid funnel pipe of the cask (called in the reissue a "suitable tubular connection") be rigid and have joined to it a flap valve, and be temporarily screwed to the *base* of the cask (where it must necessarily be with such a device); or whether it be a *hose* connected to the *top* of the cask, and without any valve, (though the Patent Office required the applicant to erase the word "flexible," as applied to this rigid funnel connection, in the amended specification filed with the application for his Reissued Patent).

Second.—The learned Court erred in finding that the apparatus used by appellant was embraced within the first claim of the Reissued Patent; because it has no such cask "with an induction passage or opening . . . substantially as described;" nor any "suitable tubular connections . . . substantially as described;" nor any cask to be lowered into a vault; nor any rigid funnel pipe with a check valve affixed, to be temporarily screwed to the base of the cask, because the words of the claim, "independently movable receiving cask . . . substantially as described," mean (and can only mean, in view of the state of the art as shown) a cask separated or separable from the other parts *and* movable in the sense of being lowered into the vault, *and* having the peculiar pipe and valve mentioned, to enable it to be operated in that way, as shown in the drawings of the patent, and described in the body of the specification as operating in that way, no other mode of operation being even suggested in that instrument.

Third.—The learned Court erred in not dismissing the bill, because the charge of infringement was not proved by any competent or sufficient evidence. The allegations of the bill in that respect were denied in the answer; and the proofs adduced were insufficient to overcome the denial.

Fourth.—The learned Court erred in sustaining the first claim of the Reissued Patent, because if construed broadly the combination therein claimed was clearly anticipated by the prior patents produced and put in evidence.

Fifth.—The learned Court erred in sustaining the third claim of the Reissued Patent, because the combination therein claimed (the elements being confessedly old, and the combination also being old as applied to close a *water* or *steam* opening), it involved no invention to apply the same arrangements of parts to close an *air* passage, or rather to prevent *water* passing an opening connected with an air passage.

Sixth.—The learned Court erred in sustaining the third claim of the Reissued Patent, because the combination therein claimed is substantially anticipated in the prior patents, publications and exhibits produced. There being no substantial difference or patentable novelty between applying such an arrangement to close an air-pipe of a night-soil cask, and applying it to close a *steam*, air, or water-pipe in a boiler, cistern, or ram, in both cases to prevent water or semi-fluids entering such pipe.

Seventh.—The learned Court erred in sustaining the first and third claims of the reissued patent as valid (the second claim not being involved), because they respectively cover and claim sub-combinations of the entire combination of elements claimed in the Original Patent; and whatever right to the same, if any, the patentee Bull originally had was wholly lost, abandoned and waived by laches in neglecting for over five years to apply for a reissue of his patent claiming such sub-combinations; and adverse rights having accrued in the meantime.

Eighth—The learned Court erred in decreeing the said Reissued Letters Patent to be a good and valid patent, because the specification and claims thereof contain new matter wholly

unwarranted by anything contained in the Original Patent or the file and contents of the application therefor or of the model filed therewith.

Ninth.—The learned Court erred in construing the element "suitable tubular connections," in the first claim of the reissue, to include a *hose* connecting the vault with the *top* of a differently constructed receiving cask and used without a check valve, (and in consequence these parts operating differently), because the file and contents of the application for the Reissued Patent shows (see record pages 218 and 228) that the Examiner objected to the word "flexible," used in connection with the words "tubular connections," in the descriptive parts and the first claim of the amended specification filed, as new "matter not shown in the original application or suggested therein;" and the applicant then *erased* the word "flexible" in both the description of invention and first claim. He now asks the Court, in effect, to restore that word by implication and construction, in order to bring appellant's device (in which a *flexible hose* connection with the vault is used) within the terms of that claim, and to give to it a meaning which he deliberately *disclaimed* for it, on objection by the Patent Office, and in order to get his patent.

Tenth.—The learned Court erred in sustaining the appellee's Reissued Patent as valid, because it is not for the same invention as that for which the Original Patent was issued. It cannot be denied that by no stretch of construction could the appellant's apparatus be held to infringe either claim of the Original Patent.

POINTS OF ARGUMENT.

1. *The state of the art, and herein of the novelty of the patented combinations, and the consequent construction to be given to the claims of the Reissued Patent.*

The prior patents and publications in evidence in the cause disclose such an advanced state of the art at the date of the original patent, that the field of invention at that time was confined within very narrow limits. Every one of the three essential elements of an odorless ex-excavating apparatus, viz.: pump, deodorizer, and receiver, had been previously used in combination for many years in Europe, and also in the United States. It was, therefore, only open to this inventor to devise some special form of one or more of these parts or some special combination of them. What he did in this respect is fully, clearly, and accurately described in the original patent, by reference to which it is found that his whole invention, fully covered by the two claims of that patent, consists [1] of a peculiarly constructed receiving cask, having certain attachments to operate it in a particular manner; [2] the combination of such cask and a suction-pump, with a peculiarly constructed "metal or water-tight" vault; (which latter element, any one familiar with the soil of New Orleans, where the inventor lived, knows is quite necessary there).

These claims the inventor is clearly entitled to, so far as the record discloses anything to the contrary; but such are not the claims of the Reissued Patent. In that instrument the second claim of the original patent is omitted altogether, the original first claim appears as the second claim of the reissue with one of its elements (the float valve) discarded; and the *third* claim of the new patent is for a combination of two of its elements, viz.: the discarded float valve of the second claim, and a portable night-soil cask; the first claim being for an "independently movable receiving cask," having an induction passage and an air pas-

sage, a deodorizer, an air pump, and "suitable tubular connections" between the pump and receiver and between the latter and a vault. Every element of his first claim had previously been used in such apparatus, including the "independently movable receiving cask," and, in combination for such purpose, are found and illustrated in the prior patents produced. Those operating on the "forcing system," being the French Patents of Lesage (pages 192 and 197 of record), the French Patent of Courdier (page 201 of record), and the Straus United States Patent (page 204 of record). The last named patent describes and shows in combination for cleaning privies: 1, an independently movable receiving vessel with an induction passage; 2, a force pump; 3, a deodorizer; 4, suitable tubular connections. It was argued in the court below that, although all the parts were here shown in combination for the same purpose, the pump was a *force* pump and not an *air* pump; but it might be argued, with much show of reason, that a mere transposition of the tubular connections between the parts, involved no invention, (viz.: placing the receiver between the pump and the vault, or placing the pump between the receiver and the vault), any well known form of double-acting pump answering the purpose for either forcing or suction only, and no special pump being described or claimed in the appellee's Reissued Patent. This is clearly shown by an expert, John F. Cook, page 104 of record. The Straus Patent (page 205) describes the receiver as "a *portable* air-tight reservoir or receiver;" and an inspection of the drawings (page 204) shows to every one at a glance that it needs but a mere transposition of the privy pipe from the pump to the receiver to make it a "vacuum" apparatus. Such a change does not involve invention.

But, it is not alone in these machines operating on the "forcing system," that the patented device is substantially shown. It is found operating on the "vacuum system" in the French Patent of Cherrier, dated December 27, 1844 (pages 190, 192, and 242, of record), and United States Patent to

J. P. Walter, dated May 6, 1862 (page 201 of record). In the former is found the air-pump, deodorizer, a plain barrel or cask (serving as a final receptacle for the fœcal matter), the latter being connected by a hose with a receiver, having induction and eduction passages placed between the vault and the cask, the material being drawn by atmospheric pressure into the air-exhausted receiver, and emptying out of it into the cask or barrel, through a hose connection between them. The "receiver" of this patent is of special construction and mounted on a frame; and Bull's is of special construction and hung on a tackle to be lowered into a vault. But in the former it is stationary, and a hose-connection is established between it and the vault. If the Reissued Patent is to be construed broadly to cover a pump, a deodorizer, hose-connections, and any kind of a separated and movable cask, this reference defeats it; for no one can contend that it constitutes a patentable difference, or involves invention to connect the final receiving *cask* of the Cherrier apparatus directly with the vault, and dispensing with the intermediate receiver, or that the intermediate receiver of the Cherrier Patent is not the substantial equivalent of the "independently movable receiving cask" of the first claim, if that claim is to be construed to mean any kind of a cask having an induction-passage and an air-opening (both of which the Cherrier receiver has), and not forming part of the pump or the deodorizer; for "independently movable" means, and can only mean, in this claim, separated or separable from, and capable of being moved, independently of, the other parts of the apparatus. The United States Patent to J. P Walter, above referred to, shows in like manner all the elements in the same combination, as the appellee insists upon having the claim construed, the only difference in construction being that the pump, the deodorizer, and the tank or receiver, are all attached to each other on the truck of a carriage; but it constitutes no invention or patentable difference to separate them, or place them separately on the truck of a carriage or on the ground. No difference in

operation of the parts would be produced by putting the tank on a separate carriage, or on a separate part of the same carriage from the air-pump. The result (*i. e.*, cleaning the well by drawing the material into an exhausted receiver by atmospheric pressure) is precisely the same, and surely the invention does not consist in reducing the *size* of the tank to that of an ordinary cask or barrel.

It would be unprofitable to further elaborate this branch of the case, for it is clear that Bull's invention did not consist in *any* kind of movable cask or independently movable cask, with *any* kind of vault connection, and combined with an air-pump and deodorizer, all these parts being very old, both separately and in combination, but *does consist of a deodorizer and pump, combined with a special construction of receiver or cask, having the several attachments constituting its peculiarity, and designed to be lowered into and operated within the vault.* Though the claim does not mention the check-valve, or the float-valve, or the suspending-shoulders, or the air-tube between the cask and pump, the words "substantially as described" imply all these, and "the Court will add to a claim all those parts which are essential to the operation of the elements named in the combination," Irwin *vs.* Dane, O. G., vol. 9, p. 642. This is the only construction to be given to it to save it, if not otherwise avoided by the inherent invalidity of the reissue; otherwise it must fall before the overwhelming force of the prior references.

The *second* claim of the reissue, (for the special construction of the receiving cask), is not in controversy; the bill does not charge infringement of that claim, and it is admitted in the proofs, that defendant does not infringe it.

The *third* claim of the Reissued Patent remains to be briefly considered. It is for a sub-combination, and consists of two elements only, *a* float valve, and *a* portable night soil cask. It is proven and conceded that both elements are old, and also,

that both are old *in combination*, to close a *water* or *steam* passage, but not to close an *air* passage. This is a refined distinction, without a substantial difference. If, as shown in the proofs, a float valve has been used with a cistern or hydrant to close a water passage, or to make a closer analogy, a float valve is applied to a boiler, to rise or fall on the water, and close or open a *steam* whistle, it does not require invention or constitute patentable difference, to substitute a cask for a boiler, a semi-fluid for a limpid fluid, or an air port for a steam port. The prior references, all clearly showing the substantial equivalent of this combination, it is not necessary to refer to at length. They consist of the patents of Heald, Patric, and Berryman, (record, pp. 207, 209, 213), and other references. From the consideration of these, it appears that a float valve *per se*, is old; that such valves applied to close *induction* pipes, are old; for opening eduction steam pipes, are old; to stop discharge pipes, are old; and their use was in cisterns, in air compressing apparatus, in tanks, in hot wells, in steam boilers, to deal with water, with steam, and to close all sorts of outlets and inlets. It is immaterial whether it be considered that this combination is anticipated, or that, in view of the state of the art, it involved no invention to apply it to shut off semi-fluids from an air opening in a night soil cask. Patentability is a question for the Court (Dunbar vs. Myers, 94 U. S. 197.) At the most it is the application of the old and well-known float valve to a new, but analagous use.

2. The Original and the Reissued Patents, and a Comparison of one with the other.

The original patent was granted to Henry C. Bull, June 6, 1871. It passed to the appellee by assignment, dated October 4, 1875 (see record, page 236), who reissued it in the name of one of its officers, Lewis R. Keizer, on an application filed January 11, 1876, the Reissued Patent being dated February 29, 1876. The history of the patent is a curious one, as de-

tailed in the testimony of Bull, examined by the appellant (pages 100 and 101 of record). The application and specification for the reissue were taken by Mr. Keizer, post haste, after he obtained title, late in the fall of 1875 (see record, page 101) to Mr. Bull, in New York, who, *without reading them*, signed and swore to the application, at the request of Mr. Keizer (record, page 101); and on this the reissue was obtained. A comparison of the original and reissue specifications discloses a very great abuse of the privilege of reissue. They differ materially in the statement of what the invention consists of, in the description of the drawings, in the description of the apparatus, in the description of the mode of operation, and in the claims (see pages 29 to 38 of this brief, where the two specifications are printed side by side, and their differences, in essential matters, noted by italicized letters).

The extent of the identity of the invention in the Original and Reissued Patents is to be determined from their face by a mere comparison, notwithstanding what was said in Batten *vs.* Taggart, 17 How., 74, and consistently with Bischoff *vs.* Wethered, 9 Wallace, 812, and according to the rule laid down in Seymour *vs.* Osborne, 11 Wallace, 545, and Powder Co. *vs.* Powder Works, 91 U. S., 134; that is, if it appears from the face of the instrument that extrinsic evidence is not needed to explain the terms of art, or to apply the description to the special matter, so that the Court is able from mere comparison to say what are the inventions described in each, and to affirm from such comparison that they are not the same, but different, then the question of identity of invention is matter of law for the Court.

The original application was filed under the act of July 8, 1870, which required a written description of the machine in full, clear, and exact terms, with distinct claims of the part, improvement, or combination claimed as new. The requirements of the statute have been complied with. The Original Patent describes the alleged invention in full, concise, and

exact terms, with distinct claims; and there is no language of doubtful meaning, or incomprehensible in any part of it. No part of the description is defective or insufficient; and if there had been any error in the specification—which there was not—there is nothing in the record to show that the error arose from inadvertence, accident, or mistake. The requirements of the statute are essential, are intended to correct honest mistakes, and not to cover up subsequent inventions, and are not answered by the action of the Commissioner in granting the reissue, but are subject to the inspection, consideration, and determination of the Court.

Gill *vs.* Wells, 22 Wall., 1.

Russell *vs.* Dodge, 93 U. S., 460, is authority for the proposition, and is so cited in Klein *vs.* Russell, 19 Wall., 43, that where the claim of a patent is valid, and the descriptive part of a specification is sufficient to support it, the patent cannot lawfully be reissued.

That the original specification claimed fully all that Bull, the inventor, or his assignees, had any right to is clearly shown by the proofs and the testimony of Bull describing his invention, on pages 99 and 100 of record; and that as appellant's apparatus, shown in the Bradley, Frazier, and Bradley & Scharf Patents, (pp. 177, 180, 183 of record), had been in use some time prior to the application for reissue, and did not infringe the claims of the original, that the evident purpose and object of the surrender and reissue was to fraudulently enlarge the claims and alter the descriptive parts of the specification, to include the appellant's apparatus. This is indicated also by a few of the ambiguous words of the reissue, considered in connection with appellant's apparatus, notably "tubular connection," instead of "funnel," to cover the *hose;* the patentee even going so far as to use the word "flexible" before the word "tubular," in the application as filed, which, however, was so bold an attempt to insert new matter that the

Patent Office required him to erase the word, both from the description and the claim; again, in the words "independently movable receiving cask," as applied to the receiver; these words being so indefinite that they could readily be construed to mean appellant's receiver; also, the words "receiving cask, having *an* induction passage or opening," instead of a receiver with an opening at its bottom, and provided with a check valve; which latter language would not answer (though the former might) as a description of appellant's apparatus, which has no induction passage at the bottom nor any check valve.

There is no suggestion or intimation in the original specification that any less number of elements named in either of the two combination claims of that patent may be embraced in one or more sub-combinations, and such a suggestion is essential to the validity of a reissue containing such sub-combinations.

Miller *vs.* Brass Co., 104 U. S., 350.

The second claim of the Original Patent, which claim included the specially constructed vault A, as an element of the combination, wholly disappears in the reissue, and the first claim of the original is expanded and enlarged into three sub-combination claims, the first of which, if appellee's construction is given to it, would be for a wholly different invention, and would be more appropriate in the Bradley, Scharf & Bradley, and Frazier Patents, and much more applicable to the devices found described therein, than in the Bull Reissue.

As respects "new matter" in the reissue specification, prohibited by the statute; it was required by law as antecedent to the granting of a patent, that the inventor should furnish a model which shall exhibit the several parts of his invention, and having in this instance furnished a model of a vault and a cask, each of peculiar construction, and nothing else whatever, he is estopped upon reissue from describing his particular vault

as any ordinary vault, his particular cask as any ordinary cask, his rigid funnel pipe as a tubular connection, and such ambiguous and false description is new matter.

Careful examination of the original specification, giving to it a broad and liberal construction, and taking into consideration every suggestion therein contained, in regard to the nature, objects, and scope of the invention, fails to disclose a sufficient or satisfactory ground for the subsequent surrender and reissue. There was perfect accord between the description and claim; the former stated clearly the devices, or peculiar combinations of them, which constitute the patentee's improvement on former apparatus of the same character, or make it to differ from them; and the latter fully covered everything described, or suggested in the former, or shown in the drawings annexed thereto, or in the model filed with the application. The claim corresponded with the description, and the latter is as full, clear and exact, even more so, certainly made up of less ambiguous words and phrases than in the reissue. There is no error from "inadvertence, accident or mistake." Under such circumstances, a reissue will not be sustained that has been obtained for the mere purpose of sub-dividing, expanding and generalizing the claim so as to make it embrace an invention not described and specified in the original.

James *vs.* Campbell, 104 U. S., 356.

This practice of expanding patents by reissue has been frequently of late condemned by this Court.

Gill *vs.* Wells, 22 Wall., 1.
Roberts *vs.* Royer, 91 U. S., 150.
Russell *vs.* Dodge, 93 U. S., 460.
Powder Co. *vs.* Powder Works 98 U. S., 138.
Ball *vs.* Langles, 102 U. S., 128.
Swain Turbine Co. *vs.* Ladd, 102 U. S., 408.

There can be no doubt that the first and third claims of the reissue are broader than any claims of the original patent. And it is not denied by the appellees that they intended thereby to cover the appellant's apparatus; indeed, such purpose is evident from the language of the amended specification. It is also evident that appellant's apparatus would not infringe either claim of the original patent. If the Court is satisfied of this, the reissue must fall.

Wood Paper Patent, 23 Wall., 566.
Johnson *vs.* R. R. Co., 105 U. S., 539.
Moffit *vs.* Rogers, 106 U. S., 423.

Apart from the objections to the Reissued Patent, already stated, an equally serious objection arises from the laches of the patentee, in applying for the reissue, even though he was otherwise entitled to have it in the form in which it now appears. Nearly five years elapsed before this alleged defect became apparent, and does not appear to have been suggested until the field of invention became occupied by numerous other parties, who took patents for their respective improvements.

In James vs. Campbell, 104 U. S, 356, it is said that a reissue may be had, where the original claim does not fully assert and define a patentee's right in the invention specified in the patent, *only when speedy application is made for its correction*, and *before adverse rights have accrued.*

What constitutes unreasonable delay in any particular case, must depend upon the facts; and the delay permissible under *some* circumstances might not be so harshly criticised as in a case where, (as here), interfering interests arose in the meantime, and where the only substantial amendment intended was in the expansion of the claims. Such an alleged defect is perceptible at once on inspection of the Original Patent, and the patentee should be held to at least ordinary diligence in asking for correction on such a ground.

Miller *vs.* Brass Co., 104 U. S., 350.
Gage *vs.* Herring, 2 S. C. Rep., 824.

It would be inequitable to sustain the claims of this reissue, even though the patentee was otherwise entitled to them, when the Original Patent did not even suggest the possibility of any of these sub-combinations forming any part of the invention, considering also, their exceedingly doubtful novelty, and that no claim was made to them until after a delay of five years, wholly unaccounted for, and that valuable improvements had been made and patented in the meantime.

Heald *vs.* Rice, 104 U. S., 737.
Matthews *vs.* Machine Co., 105 U. S., 354.
Bantz *vs.* Frantz, 105 U. S., 160.

3. The Difference Between the Devices used by the Appellant and those Described and Claimed in the Reissued Patent, as Respects the Question of Infringement.

It may be conceded that if the first and third claims (those in controversy) of the Reissued Patent should be construed literally, without restraining the generality of the same by a reference to the descriptive parts of the specification or to the Original Patent, the appellant's apparatus would, perhaps, fall within their terms; but the state of the art at the date of the Original Patent and the distinct limitation of the invention in that instrument to a receiver of specific construction, intended to operate in a particular way, in combination with elements necessary to make it operative, require that the claims of the Reissued Patent should be construed in accordance with such limitation in order to avoid the conclusion that it is for a different invention, or void for want of novelty.

It will be noticed that the first claim of the reissue omits both the check valve and the float valve as elements of the combination, and unless, in construing this claim the Court read into it by implication, all these parts which are essential to the operation of the elements named in the combination

(Irwin *vs.* Dane, 9 O. G., 642), it necessarily follows either that the claim is void as not being for an operative combination, or that the claim does not apply to the cask and its appurtenances, constructed and to be operated as described in the patent (for if so constructed it could not be successfully operated without both valves—(see Bull's testimony, page 99 of record). The claim was levelled against the Bradley cask, which, from its construction can be operated without either valve, and in fact does use only one.

The application for the Original Patent was sworn to in blank, and for the Reissue without reading the specification, so that the patentee, Bull, for the first time, when called as a witness, stated *under oath* the nature and extent of his alleged invention. He said (page 99) that he desired to improve upon the Straus machine (see Straus Patent, page 204) which would not clean deep vaults, and to that end, instead of using the *force* pump to draw up the material and *force* it into the receiver, he constructed his apparatus in the manner shown in the drawings, for the purpose, as he says, "of following up the material after it was out of the reach of the Straus pump;" and this he accomplished "*by lowering the barrel in the vault, so that the suction nozzle would enter the material.*" And the witness admitted that in the receiver to be so operated, he constructed it as shown in the drawings of the patent (and no other construction and operation is described in the specification); and to be so operated successfully *it absolutely required both the check valve and the float valve;* neither could be omitted; without either "it was not a practical thing," as he testified, (page 100 of record—folio 173.) But this was a device to be lowered into the vault, and having other appurtenances to adapt it to that use.

The appellant's apparatus is *not lowered into the vault*, consequently is not of the special form shown in the Bull Patent; has no induction-passage at its bottom, and *consequently not needing and not having any check-valve.* If there is any im-

provement in Bull over Walter and Cherrier, there is a vast improvement comparatively in Bradley, Scharf & Bradley, and Frazier, over Bull. It is therefore easy to understand why these valves were omitted as elements of the combination claimed in the first claim of the reissue. The Bull apparatus as *described, absolutely required both.* The Bradley apparatus does not absolutely require either; indeed, one cannot be used therewith, and the other is not essential. See Scharf apparatus, constructed without either valve, page 177 of record. But apart from this, no other cask but that shown in the drawing, is described in the specification, and no other operation is described than that of lowering the cask into the vault; consequently the claim is to be read as for a combination including *such* a cask, and of course impliedly including all the parts of the elements necessary to make it operative, viz.: the two valves, &c.; and as respects the "tubular connection," these words, which mean the induction connection, should be construed to mean the thing shown and described, viz.: *a neck* and *rigid funnel*, not a *flexible hose;* and this, too, is plain, not only from what has been said, but from the action of the Patent Office in requiring the patentee to strike out the word "*flexible*," before allowing the claim. (See pages 218 and 228 of the record.)

Again, the appellee's expert, Mr. Renwick, admits, pp. 22 and 25 of record, that the second claim of the reissue is for the peculiarly constructed cask, with its appurtenances, as shown in the drawing; that appellant's apparatus does not infringe that claim; that the same cask therein claimed, is the cask of both the first and third claims; though seeing the danger of this last admission, he attempted to withdraw it when called in rebuttal (6th Interrog. p. 121 of record), but the force of the explanation is lost, in view of his answers to the 6th, 7th, 8th, and 9th cross-interrogatories, pp. 134 and 135 of record. The only logical conclusion therefore, is, that as the "accessories or appurtenances," (as Mr. Renwick calls them), of the Bull cask,

are absolutely essential to its proper construction and successful operation, (as the alleged invention is shown in the drawing and described in the specification), that the patentee invented nothing but a combination of *all* these parts, all of which are conceded to be old, making up a complete apparatus; and that the first claim of the Original Patent—"*The combination and arrangement of the funnel O, neck i, and valve d with cask B, neck M, and float valve f, substantially as shown and described,*" fully covered all the patentee invented or was entitled to claim. If that is so, it follows as of course, that the cask *with its appurtenances* constitute elements of each of the three claims of the Reissued Patent, and that the appellant's apparatus is not only thus excluded from the operation of the second claim, as admitted, but is not included within either of the other two claims of that instrument.

It was in the combination of parts making up the receiver cask, that the only novelty of the invention consisted, as clearly set forth in the first claim of the Original Patent; and the patentee cannot now abandon one or more of these parts of his combination, or prove it useless and unnecessary, and maintain his claim to the rest.

Rowell *vs.* Lindsay, 6 Fed. Rep. 291.
Corn Planter Patent, 23 Wall, 224.
Water Meter Co. *vs.* Desper, 101 U. S. 337.

This case is one where (as in Duff *vs.* Sterling Pump Co., 2 S. C. Rep., 490), in view of the state of the art, the invention must be restricted to the special form and construction of the cask and its appurtenances, as shown in the drawings and described in the specification, and, it might be added, as claimed in the first claim of the Original Patent, by the patentee. Bull was not the first to make an odorless privy-cleaning apparatus, composed of pump, deodorizer, and receiver, with necessary tubes and pipes. He merely devised a

new form of receiver, and new only in the sense of its co-acting fixtures.

Railway Co. *vs.* Sayles, 97 U. S., 554.

Subsequent patentees have adopted a different and improved construction and arrangement, and, under such circumstances, the appellee's patent cannot have a meaning and scope given to the ambiguous words of its reissued claims, that would embrace all these subsequent improvements, including the appellant's apparatus.

Merrill *vs.* Yeomans, 94 U. S., 568;
Keystone Bridge Co. *vs.* Phœnix Iron Co., 95 U. S., 274;
Burns *vs.* Meyer, 100 U. S., 671.

Upon the whole case as presented, the decree should be reversed.

HECTOR T. FENTON,
Counsel for Appellant.

ORIGINAL PATENT.

Specification forming part of Letters Patent, No. 115,565, dated June 6, 1871.

I, HENRY C. BULL, of New Orleans city, in the State of Louisiana, have invented certain Improvements in Apparatus for Cleaning Privies, of which the following is a specification:

REISSUED PATENT.

Specifications forming part of Reissued Letters Patent No. 6,962, dated February 29, 1876.

To all whom it may concern:

Be it known that I HENRY C. BULL, formerly of the City New Orleans in the State of Louisiana, now of Brooklyn, in the State of New York, have invented certain improvements in Apparatus for cleaning privies; and I do hereby declare that the following specification, taken in connection with the drawings furnished and forming a part of the same, is a true, clear and complete description thereof.

Prior to my said improvement the contents of privy-vaults and other similar receptacles, generally known as "night-soil," have been transferred to transit-tanks by means of dippers and buckets, or by means of one of three general modes of operation, involving the use of mechanical contrivances. One of these methods involved the use of an endless chain with buckets attached thereto, operated by means of a rag-wheel and crank, whereby the offensive matters were raised from the vault within a close-walled portable structure, and emptied from the bucket into a tubular chute, at the discharge end of which the transit-tank was located. Communicating with the tubular

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chute a deodorizer was arranged, for disinfecting the offensive gases evolved during the operation.

Another method, known as the pumping and forcing system, involves the employment of a forcing-engine, a transit-tank, and a deodorizer, whereby the contents of the vault are drawn by suction to the pump, and forced therefrom into the transit-tank, from which the offensive gases are conducted to a deodorizer.

Another method involves the employment of apparatus operating under what is known as the "vacuum system," and it is to this system that my improvements relate.

So far as my knowledge extends, apparatus operating under the forcing and vacuum systems has heretofore embodied in all cases, large transit-tanks, which were mounted upon wheels, and this necessarily involves the use of a considerable length either of suction-hose alone, or, in addition thereto, of conducting-hose, because in practice the heavy tanks and their carriages can seldom be located closely adjacent to the vault to be emptied, as it is well known that such vaults in cities are generally hedged in by walls of buildings and by fences, leaving but little space around the vault for working operations; and although the mechanical apparatus before referred to, consisting of the chain and buckets, was arranged to deliver the offensive matter into small casks, it was rendered practically worthless for inoffensively operating in close quarters by reason of the bulk of the

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apparatus, and the portable air-tight inclosing structure within which it was necessarily mounted and operated. By reason of my invention I am enabled under any and all circumstances to transfer the contents of privy-vaults to transit-tanks, regardless of limited space, because the several parts of my apparatus are readily adjustable and locatable in relation with each other and to the vault to be emptied; and any vault having a passage way leading to it capable of receiving a barrel can be readily emptied of its contents with my improved apparatus without offense, even though it be necessary to carry the entire apparatus and the matter to be removed through a dwelling-house.

It is well known that the power of atmospheric pressure cannot be relied upon for lifting fluid matters lying below a certain depth, and that friction of the matter within the suction-pipe lessons this capacity more or less; also, that the more solid matters the fluid contains the greater the friction. For these reasons the vacuum system, as heretofore practiced, could seldom be relied upon for emptying a vault-well deeper than about fifteen or twenty feet. In some cities vault-wells have a depth of about forty feet, and one object of my invention is to empty, by the vacuum system, vaults so deep that they could not be emptied by that system as heretofore practiced.

It is well known, too, that heavy transit-tanks on wheels, when filled, must be conveyed to a convenient

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Description of the Accompanying Drawing.

Figure 1 is a view in perspective of the cask or package A, showing the method of suspending and operating the same. Fig. 2 is a side elevation of the suction-pump and furnace. Fig. 3 is a plan view of the vault. Fig. 4 is a vertical transverse section of the cask or receptacle shown in Fig. 1.

My invention relates to an improvement in devices for cleaning or emptying privy-vaults, whereby the night-soil therein contained may be removed and utilized and the disagreeable odors arising therefrom prevented. It consists of the vault A, receptacles or casks B, and the suction-pump with furnace C, constructed and operated as shown and described.

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place for discharge: if to the country by the road, much time is consumed; if to a dock, it is discharged in mass to the hold of a barge In neither case can this valuable fertilizer be distributed conveniently in lots to suit to small farmers and gardeners on rail and regular water routes.

One object of my invention is to enable the offensive matter to be made an article of trade and susceptible of being conveyed, in lots of any desired quantity by traveled routes and by the usual means of public conveyance, without creating offence.

My invention consists, mainly, in a sink-cleaning apparatus, consisting, of an air-pump, a deodorizer, and suitable *tubular connections*, in combination with an *independent or movable receiving cask*, having an induction passage or opening, and also an air-passage for connecting with the air-pump, and provided with stench and water tight covers for both passages, *whereby the moveble cask may be located in any desired position with relation to the vault*, and the air-pump and the deodorizer properly located with reference to the vault and cask, *and also whereby the cask, when filled, may be trundled on its bilge or end, after the usual manner of handling casks or barrels.*

My invention consists, further, in the combination with the cask of a flanged opening, *a detachable suction pipe* or funnel connected with the flange of the opening,

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and a check-valve located within the cask for retaining the offensive matter after passing through the valve.

My invention still further consists in the combination with the air-passage of a night-soil cask, of a float valve, whereby, when the cask is filled with fluid matters, the valve will be floated and closed, *thereby indicating that the cask is filled*, and preventing the fluid matter from entering the conducting-pipe and passage through the air-passage to the air-pump, which would otherwise be liable to have its valves clogged thereby and rendered inoperative.

To more particularly describe my invention, I will refer to the accompanying drawings in which—

Figure 1 represents, in side view a cask *embodying several features of my invention* located within a privy. Fig. 2. represents, in side view, an air-pump connected with the cask by a flexible tube or suction-hose, and provided with a deodorizer. Fig. 3 represents, a privy-vault. Fig. 4. represents, on an enlarged scale and in detail, in vertical central section, the cask shown in Fig. 1.

A, a cylindrical privy-vault, constructed of metal or other suitable water-tight material,and provided with the neck *a* and the flange *b*, which latter is designed as an auxiliary for holding it in a vertical position, as also for

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A vault is indicated at A. It is provided with the *usual* entrance or opening, *as* at *a*. B denotes one of several casks or receptacles which are employed in connection with an air-pump, as at C, for removing the offensive

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strengthening the same. B represents one of several casks or receptacles, which are employed as adjuncts of the suction-pump C, for removing the fœcal matter from the vault. It has located at its lower extremity the funnel O, which fits, air-tight, upon the neck *i*, and the valve *d*, which opens upwardly; and at its apex the float-valve *f*, is provided, which screws upon, or is otherwise caused to fit, air-tight, upon the neck M. The float-valve *f*, consists of the rod *e*, located vertically in the tube *g*, the said rod being guided by orifices, provided in transverse bars, in the upper and lower ends thereof. The lower part of the float valve is made of cork or other light material, in order that when the cask or receptacle becomes filled by the action of the suction-pump, it may press against the orifice of the tube, and thereby prevent the contents of the vault A, from overflowing or extending beyond the cask B. *h h* are shoulders, rigidly attached to the cask B, and are designed for clutching with the clamps L. V represents one of a series of caps, which are screwed upon the neck or necks of casks A, when filled by the action of the suction-pump.

The method of operating my device is as follows: After removing the seat or floor, the receptacle B, is suspended from a block and tackle over the opening, and the cask or receptacle A, is then lowered into the vault, until the fun-

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matters from the vault. The cask B has at one end a screw-neck, *i*, and the check valve *d*, which opens *inwardly*. Said cask also has another screw-neck, as at **M**, to which is attached the suction-house, which communicates with the air-pump. Attached to this neck is also a float-valve, as at *f*, which guards the entrance to the suction tube or hose. The spindle of the valve *f* is provided, in a well-known manner, with guiding devices. The lower portion of the float-valve is provided with cork or other light material whereby, when the cask is filled with fluid matter, the valve will be floated and effectually close the entrance to the suction air-pipe, preventing the latter, as well as the pump, from being clogged by said matter. The cask is shown to be provided with shoulders *h h*, whereby the hoisting-clamps **L** may readily be made to engage with the cask. *The induction-pipe O is secured to the proper screw-neck on the cask, and it constitutes a tubular connection with the cask, through which the offensive matter is conducted from the vault into the cask.*

In operation I proceed as follows: After removing the seat or floor of a privy, uncovering the entrance to the vault, the cask B is suspended, by a block and tackle over the vault, connected by the suction-pipe to the air-

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nel O, enters the fœcal matter about ten inches, whereupon, by operating the suction-pump, the receptacle or cask becomes filled with the fœces until it reaches the float-valve *f*, which presses against and closes the orifice of the tube leading to the pump. The valve *d*, then falls, and prevents the escape of the contents of the cask. In the meantime the air that is pumped out of the receptacle B, is forced into a furnace, located over the suction-pump, whereby the odor arising therefrom is destroyed. When one receptacle is thus filled, the valve *f*, is removed, and the cap V, screwed thereon, whereupon the operation is repeated by the employment of another cask, until the vault is emptied of its contents.

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pump, and then lowered until the funnel-pipe connection O (*which is temporarily screwed to the neck i of the cask*) is at its lower end immersed in the contents to be removed. The air is then exhausted from the cask by means of the pump, and deodorized by the furnace on the pump. The vacuum thus induced causes the matter to be sucked through the funnel-pipe into the cask until the float-valve is lifted and the air-passage closed. The pump is then stopped and the valve *d closes. The cask, being wholly free from exterior contact with filth, is then lifted, the funnel* and suction pipe removed, and the screw-caps V applied to the necks *i* and M, *after which the cask is handled like any filled cask, and rolled on its bilge or end.*

It will be seen that the cask, when thus constructed, may be lowered to any required depth in a vault, and filled by the vacuum system, regardless of the fact that atmospheric pressure as heretofore employed in this connection, could only empty a vault to the depth of, say, fifteen or twenty feet.

In operation the pump may be placed closely adjacent to the door of the privy, and the deodorizer serve to a greater or lesser extent to disinfect the surrounding atmosphere.

The operation of transferring the offensive matter to the cask is wholly performed within or near the privy,

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thus avoiding the objectionable publicity incident to the vacuum system as heretofore employed.

When the vaults have been so far emptied as to leave only the sedimentary deposits, the cask being located closely adjacent thereto, deposits are readily drawn into the cask, which it would be practially impossible to do if such vacuum-system apparatus as has heretofore been employed were relied on.

This portion of the operation is rendered all the more practicable by reason of a large induction passage to the cask, through which the heavy viscous matters may freely enter.

In night-soil operations, whether with the pumping and forcing or the vacuum apparatus, it frequently occurs, unavoidably, that air will freely enter the cask by way of its induction-aperture. When this occurs with a large cask on wheels, a large quantity of air is entered, which requires to be subsequently removed by the pump before operations may be continued.

With the portable independent casks employed by me, a much less quantity of air is required under these circumstances to be removed from the casks. Moreover, it is practicable to exhaust the air from small casks much more thoroughly than is possible from the huge tuns or tanks heretofore employed with vacuum apparatus, as is illustrated in the

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REISSUE.

United States patent to Walter, dated May 6, 1862.

The fertilizing material, being inclosed in casks of small size, securely sealed, and having clean exteriors, may be readily shipped by rail or steamer to various points, and delivered at any station to consumers, without any practical possibility of creating as much, or at least any more, offense than usually accompanies the trade in well-known merchantable fertilizers.

Claims.

I claim—

1. The combination and arrangement of the funnel O, neck *i*, and valve *d*, with cask B, neck M, and float-valve *f*, substantially as shown and described.

2. The combination and arrangement of the vault A, cask B, and suction-pump C, substantially in the manner and for the purpose described.

Having thus described my improvements, I claim as new and of my own invention—

1. A privy-vault-cleaning apparatus consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independently movable receiving-cask, having an induction passage or opening, and also an air-opening for connection with the air-pump, and provided with screw-necks at each opening, for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy, and cask, and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth.

ORIGINAL.

In testimony of this, my application for Letters Patent for an Improvement in Apparatus for Cleaning Privy-vaults, I hereunto subscribe my name.

HENRY C. BULL.

Witnesses:

JOEL E. CANNON,
ROBERT KING.

REISSUE.

2. The combination, with a portable cask, having an induction-aperture at one end, of a check-valve, a screw-neck surrounding the aperture, a funnel-shaped pipe connected with the neck, and an air-eduction passage provided with a screw-neck, substantially as described.

3. The combination, with a portable night-soil cask, of a float-valve located at the air-passage, substantially as described, whereby the fluid matter is prevented from entering the air-passage, and clogging the suction air-pipe and pump, as set forth.

HENRY C. BULL.

Witnesses:

WM. M. BENEDICT,
E H. BENEDICT.

109-671

OFFICE SUPREME COURT U. S.
FILED
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JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

WILLIAM E. CLEMENTS, APPELLANT,

vs.

THE ODORLESS EXCAVATING APPARATUS COMPANY.

No. 136.

Appeal from the Circuit Court of the United States for the District of Maryland.

BRIEF AND ARGUMENT IN BEHALF OF APPELLEES.

BENJ. F. PRICE,
Counsel for Appellees.

Supreme Court of the United States.

WILLIAM E. CLEMENTS, APPELLANT,

vs.

THE ODORLESS EXCAVATING APPARATUS COMPANY.

No. 136.

Appeal from the Circuit Court of the United States for the District of Maryland.

ABSTRACT OF THE CASE.

On the 6th day of June, 1871, Letters Patent of the United States were granted to Henry C. Bull, assignor of one-half his right to Joseph M. Lowenstein for an improvement in apparatuses for cleaning privies, and were numbered 115,565, a certified copy of these letters patent is filed in the case marked "Complainants' Exhibit, Bull Patent."

The specification of this patent is printed in the record on page 30 and 31, and the drawing accompanying the same appears in the record between pages 28 and 29.

This patent was re-issued to Louis R. Keizer, and the re-issue dated February 29th, 1876, No. 6962, a copy of which is inserted in the record beginning on *page* 32, and is marked *Complainants' Exhibit Re-issue.*

By mesne assignments the Odorless Excavating Apparatus Company became the owners of these Letters Patent, and brought suit for infringement thereof against William E. Clements, the defendant below, and appellant in this Court.

Prior to this suit the Appellees brought suit by bill in Equity in the Circuit Court of the United States for the District of Maryland against Thomas Quillam, which case was decided by the late Judge Giles in favor of Complainants, the present Appellees, in which the validity of the patent was affirmed, and a decree for infringement passed by the Court.

The Bill of Complaint in the present suit was filed in the Court below on the 17th day of November, 1877, by the Odorless Excavating Apparatus Company (Complainants) against the Appellant, alleging the ownership of said Letters Patent by the company, and setting out the assignments by which the title passed to it, alleging infringement by the Appellee of the 1st and 3rd claims of said letters patent, as follows:

1st. "A privy-vault cleaning apparatus consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independently-movable receiving-cask, having an induction passage or opening, and also an air-opening for receiving sealing caps or covers, substantially as described, whereby the movable cask may be located in any desired position with relation to the vault and privy, and the pump and deodorizer located in any desired position with relation to the vault, privy and cask, and also whereby the casks, when filled, may be handled as is usual with filled casks, as set forth."

3d. "The combination with a portable night-soil cask, of a float-valve located at the air-passage, substantially as

described, whereby the fluid matter is prevented from entering the air-passage, and clogging the suction air-pipe and pump as set forth."

The prayer of the Bill is for injunction, account of profits, damages and further relief.

The defendant was duly summoned and appeared in Court by counsel on the 8th day of December, 1877, filed his answer.

The answer denies that Bull was the inventor of the improvement described and claimed in his letters patent, puts the complainant to the proof of the alleged assignments, alleges that the new letters patent are not for the same invention as the original, denies the utility of the invention—alleges that the defendant is using an apparatus constructed in accordance with letters patent granted to Samuel R. Scharf and Jerome Bradley, and sold to him by said Bradley, and that "said Bradley was then and is now a stockholder in the Complainant company and one of the Complainants in the suit," and that the Defendant is licensee of said Bradley; the answer avers that Bull was not the inventor of the improvement described in the letters patent and shown in the drawings, and avers that substantially the same subject-matter was before the alleged invention described in French letters patent to

Francois Lesage, December 11th, 1855.

Certificate of addition to same, May 7th, 1857.

Louis Cherrier, December 27th, 1844.

D. Courdier, May 22, 1860.

And in the following Letters Patent of the United States.

Joseph P. Walter, 1862.

Louis Straus, January 28th, 1868.

Jno. S. Patrick, re-issued April 11, 1865.

Edwin Heald, August 21, 1866.

Robert Berryman, July 28th, 1868.

The answer further alleges that the invention was known and in public use, and further cites

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Robert Berryman, July 28th, 1868.

The answer further alleges that the invention was known and in public use, and further cites

Vol. 12 Encyclopedia Britannica, 8th edition, p. 173, Article Hydronamics.

New American Cyclopedia, vol. 9, p. 406, Article Hydraulic Rams.

Lardner's Lectures on Science, pp. 424–474, 504.

A Treatise on the Steam Engine by John Benner, and plate III appended thereto.

That the entire invention was in public use by Bull more than two years before his application for letters patent.

The answer further charges that the 3rd claim is void for want of patentable novelty.

On the 5th day of January, 1878, a general replication was filed; and examiner was appointed to take the testimony by agreement.

The suit is brought to restrain the Defendant from using an apparatus known as the Bradley apparatus, for which as the answer alleges letters patent were granted to Scharf and Bradley, the said Bradley being a stockholder in the Complainant company, and the said Defendant, Clements, being a licensee of said Bradley, and his agent for the sale of the apparatuses.

Models of these apparatuses are filed in evidence in the case, and admitted as substantially correct representations of the infringing devices by agreement filed in the cause, the mode of operation of these apparatuses is described in the testimony of James L. Murrill on pp. 19 and 20 of the record.

Testimony was taken by both sides in the case and argument made before the Court below; that Court with both Judges concurring re-affirmed the validity of the patent, and declared the first and third claims thereof to be infringed by both of the forms of apparatus filed; this opinion is inserted in the record on pp. 265, 266, and was filed on the 8th day of September, 1879.

In pursuance of the above opinion, a decree was passed, granting an injunction, and referring the case to a master to

take an account of profits and assess the damages therein. This decree was filed September 11th, 1879.

Both parties appeared before the master, who, after hearing testimony, filed his report on the 19th day of June, 1880; this report is inserted in the record beginning on page 268.

No exceptions having been filed to the above report, it was finally ratified and confirmed by the Court by order filed in the cause dated August 2nd, 1880; this order appears in the record on p. 279.

From which order this appeal was entered.

Supreme Court of the United States.

WILLIAM E. CLEMENTS, APPELLANT,

vs.

THE ODORLESS EXCAVATING APPARATUS COMPANY.

No. 136.

Appeal from the Circuit Court of the United States for the District of Maryland.

BRIEF AND ARGUMENT IN BEHALF OF APPELLEES.

The Odorless Excavating Apparatus Company, a corporation chartered under the laws of the State of Maryland, obtained its charter (see pp. 27 and 28,) for the purpose of engaging in "the manufacture and sale of improved apparatus for emptying privy-vaults, sinks, cesspools, cellars, wells and excavations, &c., and also to work the improved apparatus either under their own supervision or in connection with individuals or corporations, to sell rights, and license individuals or corporations to use said apparatus."

The certificate of incorporation is dated May 5th, 1874, and among the incorporators and directors to manage the company were Louis R. Keizer, William Painter, and Jerome Bradley—*see p.* 28. The patents belonging to Painter and Keizer were assigned to the company, and the Straus Patent was assigned to the company by Jerome Bradley, for which he received one-fourth of the capital stock of the company. This suit is brought to restrain the Defendant Clements, Bradley's licensee and agent, from using the Bradley apparatus, an apparatus constructed as Clements claims in his answer, in accordance with letters patent granted to said Bradley and one Scharf on the 18th day of July, 1876, after repeated struggles in the Patent Office, in his effort to obtain what had been patented to Bull and re-issued to Louis R. Keizer some five months previously, and assigned by Louis R. Keizer to the company of which Bradley was an incorporator and director on the 15th day of March, 1876, four months before the said Bradley and Scharf obtained the letters patent under which the Defendant claims to be working—as the dates may be important, we give them as disclosed by the record.

Bull Patent; re-issued February 29, 1876*; record p.* 32. Same assigned to Complainant Company *March* 15, 1876, *record pp.* 37 *and* 38.

Bradley, (patent) assignor of one-fifth of his right to Samuel R. Scharf *July* 18*th,* 1876, *record p.*181. Whilst it is true that the models in the case exhibit some of the parties working under what is known as The Frazier Patent—that apparatus whilst being just as clear an infringement as the other, the inventor of it claims no arrangement of the parts of the whole machine, but confines his invention to a novel coupling and other parts connected with this novel coupling, and a peculiar construction of deodorizer.

It will be seen by an examination of this Frazier Patent, that every claim contains this coupling as one feature in the combination of its elements except one, (the third) and that one is for a novel arrangement of deodorizer. (*See record p.* 186.)

Another feature in the case is the fact that not one of the apparatuses is shown to have been used anywhere in the United States prior to the date of the re-issued patent of Bull, viz., *February* 29, 1876. Jerome Bradley himself, whose deposition is subscribed April 13th, 1878, says he had been engaged in the manufacture of them about five years; but this is clearly not true, as he follows the statement immediately by saying he was manufacturing them under certain patents, one to Scharf in 1875, and the other to himself in 1876.

If a single one of the Scharf apparatuses were in practical use before the date of Complainants' re-issued patent, not a witness in the case has ever seen one. If a single apparatus built according to the method of Scharf's 1875 patent is in existence at all, it is certain that none have ever been seen by any one. Neither Scharf himself nor any one else has been brought upon the stand to testify to any such thing. The Scharf Patent was intended to be used with and upon a wagon-body, the apparatus was all arranged upon the wagon-body, he describes it all in his specification. We will place in italics what he says of this wagon body.

"My apparatus is most conveniently used *upon a wagon* drawn by one or more horses, the letter A denoting such *wagon body.* Upon the front end of this *body* is placed an air pump B, which is properly pivoted in a standard C. Upon *the body A* may be placed *a sufficient number of proper tanks, vessels or receptacles,*" &c.

Upon an examination of the drawing, it will be seen that the end of the wagon body is built expressly with a quadrangular well through which passes the pipe leading to the vault. The whole apparatus denotes the use of the tank or barrel as the patentee describes it, to be used on a wagon body. Certainly no such apparatus as this is shown in the case to have been used anywhere, either then or since.

His statement is clearly untrue also from the fact, that five years would have antedated all of the patents of this class

in the case except Bull's, and would have antedated the formation of the Complainant Company of which he was a corporator; at that time not only was this apparatus not in use, but no apparatus except Bull's, of any description other than the old night carts with pick and shovel and bucket had been in use, or were known to any one beyond a few experiments.

It is untrue also from the fact that he was engaged in his struggles with the Patent Office to obtain his patent from the summer of 1875, until it was granted in July, 1876, and not a single witness has been put upon the stand who ever saw or ever heard of one prior to the date of the Complainant's re-issued patent, viz., February 29, 1876.

It is also untrue from the fact that five years dating backwardly from April 13th, 1878, would have made his own patent void as having been in public use and on sale more than two years before his application for letters patent, which was filed in the patent office, June 29th, 1875.

The sales of these apparatuses in the cities mentioned by Bradley *on p.* 109, were all made after he had obtained his patent. One of his witnesses, William H. Boyle, who was his agent, as he says for awhile, visited a number of these cities; his testimony is given on pp. 103 and 104 of the record, it was subscribed and sworn to on the same day on which Bradley deposes, viz., on the 13th day of April, 1878, and in answer to the

"2*d Inter. Have you or not had any practical experience in the use of the apparatus of which Complainants' Exhibit is a model; and if yea, for how long?*

"*Ans. I have, for about twelve months.*"

William E. Clements, the Defendant in this suit, testifies on pp. 116, 117, 118, of the record, swears on the 15th day of April, 1878.

"2*d Inter.* Please state how long you have been engaged in the business of cleaning privies, and by what method or apparatus, if any?

"*Ans.* I have been engaged in the business about six years both ways: the first way was the old cart system, up

until the pump system commenced. I have operated with *the pump for the last two years.* In the cart system we used buckets and scoops. In the pump system *I used Bradley's apparatus.* I am the Defendant in this suit.

"3*d Inter.* When and from whom did you procure the Bradley apparatus which you have been using?

"*Ans.* From Jerome Bradley, *about two years ago.*"

We have placed the parts in italics, to which we wish to call the attention of the Court.

This Defendant when examined again before the master on p. 271, of the record, declares that he got his apparatus in the latter part of 1877, he thinks they might have been in use by others before that about one year.

He gives the only account of the date when these apparatuses were first introduced, to be found in the record—this witness and defendant, like many of the others, stated in his answer, that they had been using the apparatus since 1875—but when put to the proof of this allegation, they do not attempt to sustain it; the testimony of Clements on this point is given before the master, and is as follows, beginning on *p.* 273 *of the record*—parts of which we will place in italics.

This witness had been first asked on p. 271:

"14*th Inter.* When did you first obtain your pumping apparatus, and how long have you been working it?

"*Ans. Some time in* 1877, *the latter part.* Have been working it ever since, only when I was stopped at different times."

On p. 273.

"43*rd Inter.* I now call your attention to the 14th interrogatory and answer thereto, (the interrogatory and answer are read to witness by the master.) Are you not mistaken—obtaining that apparatus in 1877; did you not obtain it before that?

"*Ans.* I think not, to the best of knowledge.

"44*th Inter.* In your answer filed in this case you have sworn as follows: 'This respondent is not engaged in the

manufacture or sale of anything whatever, but is licensed under proper authority of the City of Baltimore, State of Maryland, to clean privies, sinks, &c., and for this purpose has, since July, 1875, and now, made use of an apparatus constructed in accordance with letters patent No. 1158743, granted to Samuel R. Scharf, and certain letters patent granted to Jerome Bradley and Samuel R. Scharf, No. 179993, which apparatus was manufactured by said Bradley and sold to him by said Bradley,' etc. Does that answer *correctly state the time when you commenced to use* and continue to use the apparatus therein mentioned?

"*Ans.* *I think not.* *I had no apparatus in* 1875. I was in the night business, but *I did not use any apparatus*, to the best of my knowledge.

"45*th Inter.* Had you not received your apparatus from Jerome Bradley, and were you not using it before you sold the apparatus to others?

"*Ans.* The apparatus had been sold by some one else, and now running, *about a year* before I commenced using or selling them. I did not use the Bradley apparatus before I commenced selling it.

"46*th Inter.* You have testified that you sold certain apparatuses to different parties; did you sell these apparatuses to the parties aforesaid before you owned one or began to work the apparatus yourself?

"*Ans.* Yes; I sold these apparatuses before I owned one myself, but I worked with a man who owned one *a year*, or in that neighborhood, before I owned one myself.

"47*th Inter.* Who was the man with whom you worked before you owned the apparatus?

"*Ans.* Lewis Minks.

"48*th Inter.* Were you working with Minks as partner?

"*Ans.* No, sir.

"49*th Inter.* Did you share with him the profits, losses, and expense of the business?

"*Ans.* No, sir; I had nothing to do with him; my teams worked for him at wages. *He was the first owner of a pump in Baltimore;* he went to Philadelphia and got it a week or two weeks after he stopped the tanks.

"50*th Inter.* How long were you selling Bradley apparatuses before you began to work the said apparatus on your own account?

"*Ans.* I may have sold two or three before I began to work an apparatus on my own account. It might have been a month or two, or a little more. I can't say, but to the best of my knowledge 1877 was the time I took hold of the sale, or used it. Bradley had three other men selling it before I took hold of it.

"51*st Inter.* You have testified that you sold the apparatus to Ferdinand Drexler; are you aware that Drexler has sworn in his answer to the suit filed against him that he has been using his apparatus since June, 1875?

"*Ans.* No; I am not aware what he swore to; if he did so swear I think he is mistaken, to the best of my knowledge.

"52*nd Inter.* You also swear that you sold it to Daniel Dougerty; are you aware that Daniel Dougerty has sworn that he has had his since 1875?

"*Ans.* I am not aware what he has sworn to, I have sworn that I did not have anything to do with them before 1877. If I did I am very much mistaken.

"53*rd Inter.* Are you aware that Frederick Martz has sworn that he had his apparatus since April, 1876; John Kinstler, March, 1876, Thomas E. Nash, July, 1876; is it possible that all of these parties could be mistaken; parties to whom you have sold the apparatuses?

"*Ans.* I don't know what they have sworn; they might just as well be mistaken as I."

It is true that the witness Wrightson says, he has been working with Mr. Frazier's apparatus since July, 1875. He makes no effort to describe it, or to show how it was constructed or whether it was the vacuum apparatus, or in any

way to designate it, no models were shown him. He was not a mechanic, and probably could not have explained it if he had been asked. The patent for the alleged infringement of the Frazier apparatus, as shown by the models was granted Oct. 5th, 1875; his application for this apparatus was filed August 5th, 1875. It is hardly likely that he could have used an apparatus before the patent had been applied for, and if such an apparatus had been used, it is almost impossible that none of these witnesses in the case had ever seen one at that time—besides it is well known that the spring and summer is the time when vault cleaning is done, if witness Wrightson had an apparatus of the Frazier pattern as filed in this case, he must have gotten it in July, 1876.

So far as the Frazier apparatus is concerned, the patent for that apparatus was granted Oct. 5th, 1875.

The Bull Patent was assigned to Louis R. Keizer, President of the company, on the 24th of August, 1875, and assigned by Louis R. Keizer, to the company, by assignment bearing date Oct. 4th, 1875, one day before the Frazier Patent was granted.

To the Odorless Excavating Apparatus Company is due, beyond doubt, the merit of having introduced a system into the United States, of cleaning wells without odor, to them alone should be given the credit of abolishing the old night cart system, and of giving to the public a method by which work could be done in day-light, and the foulest filth carried through the streets of the cities with nothing more disagreeable to the public than the passage of a sand cart—their system was immediately acknowledged. Boards of health, men of science throughout the country welcomed this system as a public boon—it was done at the cost of much labor and great expense, the highest premium was awarded to it by the American Institute of New York, in 1875, and the same award in 1876 by the United States Centennial Commission, this was upon their apparatus constructed under the forcing

plan, (at that time the vacuum plan as represented by the apparatuses in this case were not known,) and the judges of that commission in awarding the premium, declare as follows:

"4. It being the original apparatus used in this country, and having inaugurated a reform in the removal of night soil from privy vaults, &c., the sanitary advantages of which cannot be over-estimated."

The circular filed in the cause made a part of the record, beginning at p. 39, shows the character of the labor, and its success performed by this company at a time when not another apparatus for the purpose was in successful existence.

The company was formed in 1874, among the directors and incorporators were Messrs. Keizer, Painter and Jerome Bradley—in pursuance of the purposes for which the company was formed, the Bull Patent was purchased Aug. 24th, 1875, by Louis R. Keizer, its president—it was assigned by Keizer to the company in October, 1875, assigned back to him in December, 1875. Re-issued to him on the 29th of February, 1876, and assigned back to the company on the 15th of March, 1876.

The original patent to Bull being granted June 6th, 1871, and the re-issue applied for January 11th, 1876, there was a period of four years and seven months between the date of the original patent and the application for the re-issue. On the 18*th day of July*, 1876, eleven months after the Bull Patent had been purchased by Mr. Keizer, the President of the company, eight months after the first assignment from Keizer to the company, five months after it was re-issued; and four months after the re-issued patent had been assigned to the company, the Patent Office issued a patent to Jerome Bradley an incorporator and director of the company, one-fifth interest in which was assigned to Samuel Scharf, and at once the country became flooded with these apparatuses, under agencies appointed by Bradley throughout the United States, and this is the apparatus against which the company has in-

voked the aid of the Courts to protect them in its rights. This suit was brought, and Bradley appears on the witness stand to swear that he is interested in the suit, and has contributed money to aid the defence.

See his testimony p. 110, of the record, *Cross-Interrogatory* 2.

Upon an examination of the records in the Pateut Office, it was disclosed that for a full year Bradley had been engaged in a struggle with the examiners in the Patent Office, in his effort to obtain a patent, unknown of course to the company or its officers. What occurred at the Patent Office is best disclosed by the file-wrapper and contents, of which a certified copy is filed and inserted in the record beginning at p. 243.

We will place in italics, certain portions of this file-wrapper, in order that the Court's attention may be drawn to the parts we wish to emphasize.

In considering this application of Bradley, it will be remembered that the Painter and Keizer Patents were the property of the company as well as the Bull.

The specification begins on p. 244—on p. 245, he says:

"A primary object of my invention is to obtain *a continuous vacuum as an emptying agent*, by the employment of a double-acting air-pump in connection with a receiving *barrel* or *tank*, as a separate and independent part of the apparatus, and filled by a vault hose connection, whereby I not only obtain greater convenience *in handling the barrel about the vault*, but the more important advantage of filling the barrel as a separate thing by *a continuous* vacuum," &c.

On *page* 246 of the record, the file-wrapper and contents contains the following, which we will place side with the description of the same thing in the original Bull Patent.

BRADLEY.

"It is of much importance during the operation of filling the barrel to determine when it is filled, and this I do by the combination with the exhaust air-hose, and the barrel of a gauge valve; which automatically maintains an open position until it is automatically closed *by acting as a float* upon the surface of the material, as the barrel fills, *so that the valve is closed the moment the barrel is filled.*

"The effect and operation of the closing of this valve, is to instantly *prevent the further working of the pump, by cutting off the passage of air through it, and hence there can be no overflow* in the barrel."

BULL.

"The lower part of the *float-valve* is made of cork or other light material, in order that when the cask or receptacle *becomes filled* by the action of the suction pump, it may *press against the orifice of the tube* and thereby prevent the contents of the vault A, *from overflowing or extending beyond the cask B* * * * * * * by operating the suc-pump, the receptacle or cask becomes filled *until it reaches the float-valve f, which presses against and closes the orifice of the tube leading to the pump.*"

On page 248, he says—"To ascertain when it is filled, *I have combined with the exhaust hose and the barrel* a gauge valve shown in the drawing as a puppet valve, but it may be of any construction and arrangement that will answer the purpose, is placed in the *exhaust coupling*, and made *as light as possible either of wood or cork to float upon the surface of the matter as it rises in the barrel, and automatically close the opening in the exhaust pipe coupling Z*, * * * * so that as the matter approaches the top of the barrel *it lifts the valve and closes the air exhaust passage*, the effect of which *is to immediately stop the pump, and prevent the further working of the apparatus.*"

The above features he embodies in a series of eight claims, on *page* 249.

From the beginning to the end of the specification every page, every line, and we may say every word is erased.

This application is followed by an Official Letter directed to Bradley to the care of his Attorneys, Johnson & Johnson; in which all of his claims *are rejected*, and he is told among other things that the first claim is rejected on "Patent to *Henry C. Bull*, No. 115,565, *June* 6, 1871. * * *

The *second*, the *third* and the *seventh* claims, *are also met by patent to Bull.*" In reference to the 6*th claim*, he is told—"The only adaptation to privy service is in placing the pump on a truck, which *Painter and Keizer have done in their Patent*, *No.* 155,670, *Oct.* 6, 1874."

On page 251, Messrs. Johnson & Johnson renew the application of Bradley, they say—"Erase claims 1, 2, 3, 4, 6, 7 and 8, and insert the following, viz:" then follow five claims, the same thing occurs with the amended specification and claims, every line is again erased, and in an official letter he is told, page 253,

"The vault emptying pump is *found in the patent to Bull.*"

On page 254, Messrs. Johnson & Johnson, Attorneys, amend their application again, "by erasing in the amendment filed July 19, 1875, claims 2, 3 and 5," and instead thereof submit two other claims.

The lines are drawn also across both of these claims.

On page 255, *another* amended specification.

On page 256, a letter *rejecting claims* 1 and 2.

Bradley, as it appears on page 257, dispenses with Messrs. Johnson & Johnson, and is now represented by Geo. W. Dyer & Co., of Washington.

This firm renew the application, and on page 258, they say—

"*Erase the entire specification except the signatures and all of the amendments, and substitute the following:*

Then follows a long description. On page 259 of this description the following occurs:

"The barrels are provided with proper couplings for the hose, and when filled *can be transported to any suitable place and emptied for use again*, being provided for that purpose with *suitable sealed openings* in one end." * * *

Add on *page* 260:

"To ascertain when it is filled. I have combined with the the exhaust hose and the barrel a gauge valve g * * * It is placed in the *exhaust coupling*, and is made *as light as possible either of wood or cork, to float upon the surface of the matter as it rises in the barrel, and automatically close the opening in the exhaust pipe coupling Z.*"

On same page the specification concludes with three claims, the lines are drawn around and about them, erasing the whole, on the margin in the manuscript copy, appears in lead pencil, opposite the *first claim*, the words

Scharf & Painter,

and in the same margin, opposite the *second claim*, appear also

Bull

in lead pencil the words

Bull.

On page 261, another official letter, rejecting the two remaining claims, and as to the *first* claim, they say—"see *Painter & Keizer's pump for emptying cess-pools, No.* 155,670, *Oct.* 6, 1874."

Referring to the *second* claim, they say—

"Bull's Patent, No. 115,565, June 6, 1871, answers the second claim," p. 262.

So that the record shows that of the first application, he is told that his first, second, third and seventh claims are met by the Bull Patent, and the sixth by the Painter and Keizer, which application he renews and starts out by erasing the first, second, third, fourth, sixth, seventh and eighth claims, and this amendment he is told again he is encroaching on Bull. He makes a third application with two claims, these are also rejected. He then employs other attorneys, who order the entire specification to be erased except the

signatures, and submits again for a fourth time his application with three claims ; he erases the third of his own accord, the other two are rejected again ; on the first he is referred to the Painter & Keizer Pump, and the second is rejected again on the Bull Patent.

Three times he is told that he is attempting to claim inventions shown to be in the Bull Patent, and four times he renews his application in the vain endeavor each time to get a patent for something which Bull does not describe or show.

In view of the proceedings in the Patent Office it cannot be said that the Complainant company were attempting to cover the invention of Scharf or of Bradley & Scharf, it is too clear for controversy that Bradley was attempting to obtain from the office a patent for that which he knew, as a corporator and director of the company, belonged to it, and to gather to himself the rewards of the time, labor and expenditures of the company.

In the light of the above facts we respectfully ask the Court to construe the re-issued patent upon which this suit is brought, and if the Court find that Bull was clearly the inventor of the things claimed and was entitled to claim them as his invention in view of the state of the art, and the Court further find that the infringement was clear, we ask that the decree of the Court below be affirmed.

The most casual glance at the Bull apparatus by one conversant with the state of the art would show that its chief merit lay in—

1st. Its capacity to be used at any well of any depth ; *i. e.* with the tank in the vault house, or down in the well, according as circumstances required.

2nd. The ease and facility with which it could be closed when filled so as to hold the contents and handled without trouble and without offensive odor.

3rd. Its capacity for ascertaining when the barrel was filled, so as to prevent the filth from entering the suction air-pipe and pump, to stop the flow of fæcal matter when

there was sufficient in the barrel, and this no matter where or in what position the barrel was placed.

4th. Its simplicity and compactness.

5th. Its capacity to form and maintain a continuous vacuum.

That these were the features which made the Bull apparatus a success, when Walter Cherrier and all other apparatuses of the vacuum system had failed, and that these features were inherent in the structure as clearly shown in the original patent, and indicated in the drawing and Patent Office model, as well as in the specification, it will be our duty now to show; that the specification was amended in order to make this more clear, and that as amended it contains no more than the patentee was entitled to we hope to be able to demonstrate.

The cleaning of wells and sinks as introduced in this country by the Odorless Excavating Apparatus Company, the Complainant in this suit, consisted *first* of what is known as the forcing system; under this system the pump and pump only could be located near the privy and vault; the suction pipe leading from the pump was dropped into the well and the contents of the well were thus drawn *into the pump*, passed *through* the pump and by the pump piston were *forced* into a large tank or tun. This tank or tun was placed wherever room could be found for it, in the street or alley nearest the premises; as the matter entered this tank and expelled the air whose place it supplied, the foul air passed through a deodorizer; this system is well illustrated by the apparatus shown in the wood-cut between *pp.* 44 and 45 of the record; this apparatus with the improvement in pumps, valves, &c., as shown on p. 45, the inventions of Messrs. Painter & Keizer, was the first successful apparatus of the kind ever used in this country.

To this class of apparatus, belong the Straus, Lesage, and Courdier, filed in evidence in this cause.

The other great system is what is known as the *vacuum* system; this system comprises all of those apparatuses

which form a vacuum in the tank, in which the contents of the vault never enter the pump, which is used only for the purpose of creating a vacuum in the tank.

The only two apparatus shown in the case belonging to this system are the Cherrier and the Walter, prior in date to the Bull patent. The Bull patent, however, and its infringements, such as are shown in the Bradley and Frazier apparatuses, are those which are in use, as no machine constructed like either the Walter or the Cherrier exhibits have been shown ever to have been in practical use anywhere.

In order to show the merit of the Bull invention as illustrated by the patented devices which preceded it, we will take those exhibits which are filed as affecting the validity of the first claim, and dispose of those of the forcing system in the order of their dates, first

FRANCOIS LESAGE.

The drawings of this apparatus are inserted in the record immediately before *page* 167, and the description in the French language begins on p. 167 and ends on p. 175.

This apparatus is one of those large tuns which cannot and never was intended to be brought at or near the vault, unless the vault to be cleaned was located in an open field. Certainly as these vaults are arranged in the cities and towns this large tun would have to remain in the street, and the contents of the vault passing through the pump are forced thereby to the tank. It is evident from a glance at the apparatus that no well of a greater depth than 25 feet could be emptied by this apparatus. The differences between it and the Bull apparatus are so clearly pointed out and explained by Mr. Renwick, that we will quote his testimony thereon, to be found in the record on p. 125:

"I have examined the drawings and descriptions of Lesage, and have compared them with the Bull apparatus, and I do not find described or represented in Lesage the apparatus described in the Bull Patent, and referred to in the first

claim thereof. The Lesage apparatus, in its various modifications, works substantially in the same way. It does not use an air-pump for exhausting a receiver of any kind, so that the fæcal matter shall flow into a receiver of this kind by means of atmospheric pressure, but on the contrary, uses what is commonly known as a lift and force-pump, for forcing the fæcal matter into a large tun, supported on wheels, in which tun no vacuum ever exists. In the Lesage apparatus, the fæcal matter all passes through the pump; in the Bull apparatus none of them pass through the pump. In the Bull apparatus the receiver must have a vacuum formed and maintained in it; in the Lesage apparatus a vacuum is never formed in the receiving-vessel. In the Bull apparatus the pump drives the foul air directly into the deodorizer, while in Lesage the foul air goes from the receiver into the deodorizer. In Bull the tubular connection, through which matters are forced up by atmospheric pressure, is connected with the receiving vessel; in Lesage the same pipe is connected with the pump. In Bull the pump lies between the receiving-cask and deodorizer, and is an air-pump pumping nothing but air or gas; in Lesage the pump lies between the privy-vault and the receiver, and pumps fæcal matter through the pump. Now even under the supposition, that an air-pump and force and lift-pump are one and the same thing, (a supposition which is usually, if not always, incorrect,) and under the supposition, that the large tun on wheels is the same as the independently portable receiving-cask of the Bull Patent, the elements in Lesage are combined in an entirely different manner, and so as to act in a different way from the way they are combined and act in the Bull Patent. The Bull Patent works on the vacuum system, as it is commonly called, that is, by making a vacuum in the receiving-cask, and the Lesage apparatus works on what I call the forcing system, in which the fæcal matter is forced by means of a pump into a receiver.

"16*th Inter.* Answer the last interrogatory in relation to the third claim of the Bull Re-issue?

"*Ans.* The combination claimed in the third claim of the Bull Re-issue, does not exist in the Lesage description, because neither the drawings nor descriptions of Lesage represent or refer to any valve closed by a float, which is one of the elements in combination with other elements in the third claim of the Bull Patent."

Mr. Renwick is asked to compare the Courdier apparatus with the Bull Patent in the same way, which he does as follows:

"*Ans.* I have made the comparison and do not find in Exhibit 'I' of the Courdier descriptions and drawing, the combinations referred to in either the first or third claims of the Bull Reissue. The Courdier apparatus is a forcing apparatus, having substantially the same elements as the Lesage, combined in the same way, and to produce the same effect, and all I have said as to the differences between Lesage and Bull may be said with regard to the differences between Courdier and Bull, the differences are the same in both cases. The Courdier apparatus has a float, which when the large tun is sufficiently full, rings a bell to notify the operator, but it has not a float actuating a valve, in combination with the air-pipe of an air-pump, and therefore does not exhibit the combination referred to in the third claim of the Bull Re-issue."

With Mr. Renwick's testimony on the differences between the Straus and the Bull Patents, we will conclude our examination of the *force pump* exhibits; his testimony is given on pp. 127 and 128 of the record:

"I have examined Defendant's Exhibit K, and it does not describe or represent the combinations described in the Bull Patent, and referred to in the first and third claims thereof. The apparatus, described by Straus, consists of a peculiar kind of lift and force-pump, a receiving vessel, and a deodorizer. The pump is peculiar, in that it has its valves worked by cams or toes, instead of as usual, having these valves self-acting and open and shut by differences of pressure. The receiver, as I understand it, is to be air-tight, and constructed

in any suitable manner, and the deodorizer is an ordinary deodorizer. In the operation of the apparatus, the induction-valve-chest of the pump is to be connected by means of a hose with the fæcal matter in the vault; the eduction or delivery-valve-chest of the pump is connected by another hose with the receiving-tank, and this tank is connected by a third hose with the deodorizer. When the pump is put into operation, it will lift fæcal matter from the vault, such matter passing through the pumps and through the valves thereof, and the pump will force this matter into the receiver, which has a pane of glass inserted in it, so that a watcher may see when it is full. The gases arising from the fæcal matter in the tank will pass through the third hose I spoke of, into the deodorizer, and be deodorized there. In this contrivance the pump acts as a lift and force-pump, and the fæcal matters pass through it. In Bull's apparatus the pump is an air-pump, and no fæcal matter ever enters it. In Straus, the vacuum is never formed in the receiving-tank, and the fæcal matter is forced into it, by pressure exerted by the piston of the pump. In Bull's contrivance, a vacuum is formed and maintained in the receiving-vessel, and the fæcal matter rises therein by what is commonly called suction. In Straus, commencing with the vault, the elements of the apparatus are arranged, as follows: First, suction-hose; second, lift and force-pump; third, delivery-hose; fourth, receiver; and fifth, deodorizer. In Bull, commencing with the same point, there is, first, suction-hose; second, receiver; third, air-hose leading to the air-pump; fourth, air-pump; and fifth, deodorizer. It will therefore appear, even supposing the elements the same, that they are not only arranged, but also combined in a different way from Bull, so as to work in a different manner; and I therefore do not find in this Straus Patent the combination referred to in the first claim of the Bull Re-issue. Straus does not describe in his patent any float-valve which will stop the flow of the fæcal matter, but provides the receiving-tank with a glass window, in order to ascertain when it is full, and therefore does not ex-

hibit the invention referred to in the third claim of the Bull Re-issue."

It is plain from these illustrations that none of these apparatuses ever were intended to be used, and could not be used in the same way as the Bull apparatus; that they do not present any of the features which make the Bull apparatus valuable—none of them could be placed within the privy, the tanks could not be lowered or manipulated, and none of them could empty a deep well.

We approach now the devices belonging to the vacuum system, and a short review of them will suffice to show the great merit of the Bull invention—and first

THE CHERRIER.

The drawings of this apparatus are inserted in the record, between pp. 188 and 189, and the description thereof begins on p. 187, and ends on p. 191.

The description of this apparatus is given in full and clear terms by Mr. Renwick, beginning on *p.* 122 of this description and comparison between it and the Bull Patent we will quote only his answer to *Inter.* 14, beginning on p. 123.

"14*th Inter.* Referring to the 26th Interrogatory, on page 33 of the printed testimony, Mr. Dodge is asked, in relation to the Cherrier, what elements, if any, he finds therein, claimed in the first claim of Complainant's Exhibit Re-issue. I now ask you, if you find in said Exhibit Cherrier, the same combinations as described in Complainant's Exhibit Re-issue, and referred to in the first claim thereof, and give your reasons?

"*Ans.* I do not. One of the elements of the claim of the re-issue is the independently movable cask, which is so connected with the privy-vault and the air-pump, that the fæcal matter may ascend directly into the movable cask in which it is carried away, and so that a vacuum may be formed and kept up or maintained in this movable cask, while it is being filled, this maintaining of the vacuum

enabling the cask to be filled full, instead of only being partially filled, like the upper recipient B of Cherrier. Now I do find in Cherrier an air-pump, which is one of the elements of the first claim of the Bull Re-issue, a receiving-cask, which is another of these elements, and a tubular connection, extending down into the vault, so that the fæcal matter may rise into it, and I also find in Cherrier a deodorizer, arranged in relation to the pump substantially as it is in Bull. I do not find in the description or drawing of Cherrier, any hint or description, that the independently movable cask has two openings, nor screw-necks nor their equivalent on those openings, and I do not find that these elements of Cherrier are combined in the same way as they are in Bull, or to operate in the same way, or without the aid of several other elements, not needed in the Bull combination. In the first place, the pump is so combined with the independently movable cask in the Bull Patent, that a vacuum can be formed and maintained therein, and this is the cask in which the filth is carried away. Now the air-pump of Cherrier is not directly connected with this cask, as in Bull, nor is it even combined indirectly with it, through the medium of the recipients and spout, it being evident that the pump cannot be worked to any useful effect in Cherrier, while the cocks are open through which it is connected with this cask, and the Cherrier pump can never make or maintain a vacuum in the cask, in which the filth is carried away. Second, in Cherrier the ascending pipe is never combined with the movable cask, as it is in Bull, so that the matter may ascend directly from the privy into the cask in which it is carried away, and never, in Cherrier, gets into that cask by being forced up by atmospheric pressure; in Cherrier the matters run through a spout into this cask by gravity, and while it is so being filled, the ascending pipe is either entirely cut off from the cask by shutting the cocks, or if it be left open to the cask, it will let the matter fall in the ascending pipe while the cask is filling, instead of rising in that pipe while the cask is filling, as it does in Bull. If it

should be stated that the recipient B is the equivalent of the independently movable receiving-cask or portable night-soil cask of Bull, then I should state, that this recipient was not independently portable, was not intended and could not be used for carrying away the night soil received into it, and was not intended to be used as I have before stated, in such a manner, that a vacuum could be maintained while it was being filled; and further, that it has not any screw necks, or their equivalent, which are the very means by which the cask of Bull is capable of being made independently portable, so that it will both receive the night-soil from the privy and permit of its transportation, after being disconnected from the tubular connection, by means of which it is put in connection with the fæcal matter in the privy and with the air-pump."

Without at present calling the attention of the Court to the differences between the testimony as to the mode in which this apparatus performs its function, we desire here to remark that at least the witnesses are agreed upon one thing, that is, that the apparatus in order to perform its functions requires all the parts above named, and could not work at all as constructed in the absence of any one of them; that is to say a rigid frame, three receiving tanks, five tubes, five cocks, all bolted rigidly together, are each and all necessary parts in the combination which taken together, and with the pump deodorizer, and manometer make the apparatus complete, and none of these could be dispensed with. Upon this point we say—whatever may be their differences on other points—Dodge, Renwick and Cherrier are all agreed, and were we to stop here and point out to the Court, that the Bull Re-issued Patent dispenses with twelve of these parts in the combination of the Cherrier, namely: one frame, two receiving casks, three tubes, five cocks and one manometer, it would require very little argument to show the difference, we mean the patentable difference between the two, and the real merit of Bull in perfecting his apparatus.

The cross-examination of Mr. Renwick serves only the purpose of bringing out more clearly these differences.

On p. 146 of the record he is interrogated as follows:

"86*th Cross-Inter.* From your last answer I infer, that you consider that the Cherrier apparatus anticipates the combination referred to in the first claim of the Bull Re-issue, so far as it is used merely for the purpose of filling the recipient or receiving-vessel. Is that so?

"*Ans.* Your inference is incorrect, it is not so.

"87*th Cross-Inter.* Why not?

"*Ans.* Because the recipient of Cherrier is not independently portable, but is firmly connected to the pump, firmly bolted to the suction-pipe, firmly fastened to another recipient and to a cast iron stand, and because it has no screw-necks, and because it is not a vessel in which the fæcal matter can be carried away.

"88*th Cross-Inter.* Are those the only reasons?

"*Ans.* Yes, all that I think of now."

We will conclude by quoting the testimony of Renwick on the

WALTER PATENT.

The drawings of this apparatus appears in the record in front of p. 204. The specification begins on p. 202.

Mr. Renwick's testimony which we quote is given on pp. 126 and 127 of the record.

"*Ans.* I am well acquainted with the Walter Patent Exhibit 'J,' and have again looked at it since the question was put. The Walter apparatus is a large tun mounted on wheels, and has firmly bolted to it two air-pumps, which are by means of proper pipes and passages so connected with the receiving-vessel or tun, that the operation of the pumps, during the dragging of the tun on its wheels, will create a vacuum in the receiving-tank; in order that the pumps may perform this duty, they are furnished with levers, which are actuated by cams, keyed on the hind wheels or hind axles of

the running gear which supports the tun, the whole construction being such, that when the tun is drawn along with the various cocks and connections in their proper position, a vacuum will be formed in the tun. The operation of the contrivance is as follows: supposing the tun to be empty, it is to be drawn to the privy to be cleaned out, and while being so drawn, the pumps create a vacuum in the tun or receiver. When the apparatus is in place, a suction hose is to be attached to the tun at one end while the other end is to be dropped into the fæcal matter in the vault. If the valve on the pipe to which the hose is attached be now opened, the fæcal matter will rise into the tun, until the gas emanating therefrom destroys the vacuum in the tun; in this way the tun can be partially filled with fæcal matter. In this Walter apparatus, the air-pumps, as I before stated, are bolted fast to the tun or receiving-vessel, so that the latter is not independently movable, and the pumps must be carried away with the receiving-tank whenever it is moved from the privy, which is not the case with the Bull apparatus; further, in this apparatus the vacuum cannot be maintained or kept up during the filling, and consequently the tun can never be filled full, the contrary being the case in the operation of Bull's combination; and lastly, the tun has no air opening, provided with a screw-neck, so that an air-hose leading from an air-pump can be attached to and detached from the tun. Now even under the supposition, (which I believe to be incorrect,) that the large tun of Walter, with its rigidly attached running gear, is the same thing as the portable cask of Bull, it will appear that this tun has not one of the necessary appurtenances of the Bull cask, which is one of the elements of Bull's first claim: second, that it is not an independently movable cask, but must, whenever it moves, carry the air-pumps along with it; and third, that the combination of the air-pump with the other part of the contrivances in Walter, is such, that a vacuum is not kept up or maintained in the tun, while it is being filled, in consequence whereof the tank is never filled

full; it is evident, therefore, that the combination described in the Walter Patent is different from that referred to in the first claim of the Bull Re-issue. As the Walter Patent does not describe any float-valve in combination with the pipe leading to the air-pump, (the fact being that such valve is entirely unnecessary in his apparatus,) the Walter Patent does not describe or refer to the elements making up the combination of the third claim of the Bull Re-issue."

It is plain that nothing contained in the above exhibits affects the rights of Bull or his assignees in as patentee and inventor of those features in his apparatus which give it its great value; the question is plainly put to Mr. Renwick, and we ask permission of the Court to introduce the question here, and his answer thereto, as a part of our argument in the case.

The question and answer are contained on pp. 128 and 129 of the record:

"20*th Inter.* I now ask you the same question that was asked by Defendant's counsel of Mr. Dodge, in the 36th interrogatory on page 38 of the printed testimony, as follows: 'In view of the Patents of Cherrier, Lesage, Courdier, Walter and Straus, what restrictions, if any, should be placed upon the first claim of the Reissued Patent 6,962, (Complainant's Exhibit Reissue)?'"

"*Ans.* None that I can see. The contrivances of Courdier, Straus and Lesage, although unlike in some points, all work without the aid of an air-pump, all work by the aid of a force and lift-pump, all pass the fæcal matter through the pump, all force this matter into the receiver, and never either make or maintain a vacuum in the receiver. They therefore all of them exhibit different combinations from that referred to in the first claim of the Bull Reissue.

"The apparatus of Walter does use an air-pump, and does make a vacuum in the receiving-tun, but it never maintains that vacuum while the tun is being filled; and in the Walter apparatus the tun is not either independently movable or portable, because in Walter, the air-pumps are so

secured to the tun, that neither can be moved without the other. In the Bull apparatus, the receiving-tank is independently movable and portable, and the pump is so combined with it, that the vacuum cannot only be formed in the receiving-tank, but can be maintained or kept up therein while it is being filled. If Bull's apparatus were made to conform with Walter's, (leaving out the question of the portability of the receiving-vessel,) there would be in Bull's apparatus a pump for every receiving-cask, and the casks could not be filled full. Bull's contrivance, therefore, is economical as contrasted with Walter, in the fact, that it needs only one air-pump for several receiving-casks, and that the casks may be filled full; and further, in the fact, that the use of the portable cask enables work to be done by means of the Bull apparatus, which could not be well performed, if performed at all, by Walter's. I refer here to the capacity that the Bull receiving-cask has, in being placed close to or in the privy itself, while in many instances, the Walter must be kept at a great distance, thereby necessitating the use of long lengths of suction-hose, which are liable to leakage at the joints, and which moreover compels the fæcal matter to move under considerable friction, thereby preventing the apparatus from emptying as deep a privy as it could empty, if the receiving-tank could be placed near the privy. Further, the Bull portable receiving vessel can be lowered down into the vault, so that a vault of any depth can be emptied. Now as Walter cannot keep up and maintain a vacuum, as he has no independently movable receiving-tank, as he has no portable tank, which can be always brought close to, or, if necessary, lowered into the vault, it is my opinion, that the state of the art exhibited in the Walter Patent, does not limit the first claim of the Bull Reissue.

"I have already referred very fully to the construction of the Cherrier apparatus. One great feature of the Bull apparatus is, that it forms and maintains a vacuum in the very cask in which the fæcal matter is carried away. This

cask, in which the fæcal matter is carried away, being independently, but directly, through the hose, connected with the vault or privy and with the air-pump. Now in Cherrier, the cask in which the fæcal matter is transported away, never had a vacuum formed in it, and consequently cannot have a vacuum maintained in it; and this receiving cask is not directly connected with the vault by a hose, nor even indirectly connected with it by a pipe or hose, in such manner that the cask would fill by suction as the Bull cask does; neither is the cask of Cherrier combined with the air-pump directly or indirectly, in such manner that, as in Bull, the pump will form a vacuum in the cask in which the matter is transported. In fact, in Cherrier the pump is not combined with the cask at all, because the operation of the pump can never produce any effect upon the cavity of the cask. Cherrier's apparatus, it is true, has a cask, has an air-pump, has a deodorizer, has a tube leading from the air-pump to a receiving vessel, other and different from the cask, and has a connection between the pump and the deodorizer, but these elements are not combined in substantially the same manner in which they are combined in Bull, and cannot be used at all without the aid of the two spherical recipients, the passage between them, the stop-cock in the passage, the spout, the stop-cock in the spout, and I do not think it can be used practically without the use of the stop-cock in the suction-pipe from the vault, and the air-cock 'r.' Now even under the supposition, that the cask of Cherrier has the screw-necks of the Bull Patent, and under the other incorrect supposition, that Cherrier's apparatus works in substantially the same way as Bull's, it would appear that the Bull combination dispenses with the two recipients, the spout, and the stop-cock of the Cherrier contrivance, and therefore, that the state of the art represented in the Cherrier Patent, does not limit the first claim of the Bull Reissue, which is undoubtedly limited by its own language to a combination, in which a vacuum is formed in the receiving-cask, which is independently movable, and which

is the very cask used for carrying away the fæcal matter, thereby dispensing with the use of a secondary cask, with the labor of filling it, and with the annoyance of slopping the filth, and escape of gas, while it is being filled through a spout.

"21*st Inter*. I desire now to call your attention to the latter portion of Mr. Dodge's answer to the 37th interrogatory, on page 39 of the testimony, as follows: 'As I view this Bull Patent in the light of the state of the art, as shown by the several exhibits, the only thing which he invented was his peculiar receiving-tank, and the arrangement for letting it down into the vault.' Do you agree with Mr. Dodge in this view, and if not, why not?"

"*Ans.* I do not, and I do not think that Bull limits himself to any peculiar receiving-tank. It is called a cask, both in the original and in the reissue, and is not described as being made in any special way. Bull does describe special appurtenances or accessories to the cask, and the first claim is not limited by the state of the art, but by its own language, to a cask provided with two of these appurtenances, namely, the screw-necks. I have already gone over at length the exhibits referring to the state of the art, and have given my reasons why the state of the art does not limit the first claim, and do not think it necessary to repeat them. I will further state, that Bull did not invent a block and tackle, which Mr. Dodge seems to think is one of the two things he did invent. I have known of a block and tackle with a cask slung on it, for more than fifty years."

We think then it is too plain for controversy, that the invention of Bull, as shown in his first claim is not limited by the state of the art as it existed at the date of his invention.

As with the first, so with the third claim, and without quoting all of the testimony in relation thereto, we will ask the Court to read it; that of Mr. Dodge on these exhibits begins at the bottom of p. 89, of the testimony, the cross-examination of Mr. Dodge begins on p. 92, of the record.

The testimony of Mr. Renwick, on the exhibits filed as anticipations of the second claim begins on p. 130, of the record. He takes them up in order, The Heald, Patrick, Berryman, Bourne, Encyclopædias and Perrigo.

There is found in none of these exhibits a float valve combined with the air-passage leading to a pump for the purposes described in the patent, and beyond a doubt Bull was the inventor of this most useful feature of the machine.

Counsel for Defendant labored hard to show that there was no invention in this arrangement of float valve of Bull; and on p. 146, of the record.

95*th Cross-Inter.*—Mr. Renwick is asked as follows:

"In view of the state of the art as it was in 1871, did the combination claimed in the third claim of the Bull Re-issue, then require invention on the part of a mechanic of ordinary skill, versed in the branch of mechanics to which that combination pertains?

"*Ans.*—In my opinion, yes.

"49*th Cross-Inter.*—In what particular was invention required?

"*Ans.*—First in conceiving the idea that the flow of liquid into a vessel could be stopped by shutting off the pipe, by means of which a vacuum was formed in the said vessel, at the same time preventing the flow of fæcal matter into the pump-pipe and pump itself; and second, in combining together old devices, so as to produce that effect. After I had explained to a mechanical engineer, that my plan was to stop the flow of liquid into a vessel, and prevent the liquid from entering the air-pipe and pump, by means of a float valve, located at the mouth of the pipe leading to the air-pump, and explained to him also, that I wanted the devices so arranged that I could practically fill the barrel full, a mechanical engineer would probably have devised the combination of devices to carry out my plan, without the exercise of invention. From my experience with ordinary mechanics, I doubt very much if one could carry out the inven-

tion, even after the idea had been explained to him. By ordinary mechanic, I mean, for instance, a plumber who was versed in the construction of ball-cock valves."

It cannot be denied that Mr. Bull was clearly the inventor of this most useful improvement. An improvement like the devices shown in the first claim, was not limited by anything shown by the state of the art.

If then the re-issued patent and its claims with the devices shown therein were novel, was it not clearly within his rights and the rights of his assignee to have his patent re-issued, in order that those rights might be clearly defined and pointed out.

In the case of *James vs. Campbell*, 104 *U. S. Rep., p.* 371, the Court says:

"Of course, if by actual inadvertence, accident or mistake, innocently committed, the claim does not fully assert or define the patentee's right in the invention specified in the patent, a speedy application for its correction, before adverse rights have accrued may be granted, as we have explained in the recent case of *Miller vs. Brass Company,*" (*supra p.* 350.)

And in the case of *The Powder Company vs. Powder Works*, 98 *U. S. Rep., p.* 137, this Court in speaking of re-issues uses the following language:

"The danger to be provided against was the temptation to amend a patent so as to cover improvements which might have come into use, or might have been invented by others after its issue."

As these are the latest expressions of the Court, defining the law on the subject of re-issues, we have seen an award of the highest medal to this company by the Centennial Commission *in* 1876, in which the judges declare of the Complainant's apparatus under the forcing system, that it was the original apparatus introduced in this country—this apparatus was introduced by the Complainant's company, organized in 1874. At the time of this report in 1876, the forcing system stood alone without a competitor in the market,—

clearly then this patent was not re-issued to cover improvements which had come into use after the original patent, and before the re-issue. Nor was it re-issued to cover inventions patented after the original and before the re-issue.

The only two patents of this class, are the Scharf Patent, Jan'y 12th, 1875, and the Frazier Patent, Oct. 5th, 1875.

Let us examine first the Scharf Patent The drawing and description begin on p. 178.

If the Court will look at this apparatus it will be seen that every part of it is located upon a wagon body, and the wagon body constructed purposely to hold the parts; it is certainly safe to say, that the apparatus used in the way described by the inventor, does not include one of the principal features of the mode of operation of the Bull apparatus, viz: its capacity to be moved in and about the vault, so that a well of any depth may be cleaned, as it is shown and described by the inventor himself, the apparatus has not a particle of capacity for cleaning vaults, greater than the old Walter apparatus. To illustrate this, let us suppose the wagon body to be placed near a vault, with the pipe E, passing through the quadrangular opening in the end of the body, and supposing a perfect vacuum to be formed in the barrel and pipe E, it is evident that the vault contents could not be lifted by the vacuum, a greater distance than *thirty-three feet from the top of the cask*, it is safe to say that the top of the barrel is at least eight feet from the ground, and the top of the fluid matter in the vault several feet below that, so that practically *with a perfect vacuum*, and the apparatus used under the most favorable circumstances, it would be impossible to clean a vault with this apparatus, to a greater depth than twenty-five feet below the surface of its contents, when we add to this, the practical difficulty of getting the wagon near the vault, in cities where these apparatuses are used, and the long length of hose, with the friction of the fecal matter, and the impossibility of forming a perfect vacuum with a pump, it is evident, that with this

apparatus, its full capacity would be strongly tested in an effort to clean an ordinary vault to a greater depth than twelve feet below the surface of its contents.

We are aware that the first claim of this apparatus, was an arrangement "whereby vessel and pump are independently movable about the vault," but it is perfectly apparent upon the most casual inspection of the drawing and description of the original Bull Patent compared with the first claim of Scharf, that there is no difference whatever between the two apparatuses, except that he puts a flexible pipe from the barrel to the well, and puts the flexible pipe in the top of the barrel instead of in the bottom.

Taking Bull's apparatus as shown and described in his original patent, and place the tank on the seat in the vault-house with the funnel in the ordinary hole or opening in the seat, and a pipe either rigid or flexible extending down into the fæcal matter, and it seems to us impossible to come to any conclusion than that they are identically the same apparatus, operated in the same way; and whatever differences there may be, is the work of a mechanic and not of an inventor.

Indeed, the expert for the defence, with every disposition to make a good case for his clients, virtually admits this in cross-examination, *see p.* 97 of the record, and was finally forced to declare that the substitution of a flexible hose for the funnel O in the Bull apparatus was not invention, he admits this in the following testimony on p. 98 of the record:

"33*d Cross-Inter.* In case a tube, such as I have described, was used upon the receiving-cask, as shown in said original patent, could you not place the cask on the seat of a privy-vault, the tube passing through the hole, and extending into the matter in the vault, and in this way empty the vault of its contents, if it was not too deep, without the use of a block and tackle?

"*Ans.* Yes, if the hole in the privy-seat were large enough to receive the tube with its funnel, but in such a

case, the tube would have to be made long enough, in the first instance, to reach to the bottom of the vault, or would have to be elongated as the material in the vault lowered, so as to keep its lower end immersed, until the material in the vault was exhausted.

"*34th Cross-Inter.* Now suppose the rigid tube to be removed and a flexible one substituted, would this involve any invention?

"*Ans.* It might not involve invention, but it would materially change the apparatus, and enable it to be used in a position different from that shown and described in the patent, thereby conferring upon it a capacity which it did not originally contain.

"*35th Cross-Inter.* Did you not say, in your answer to the 18th cross-interrogatory, in speaking of the tube H leading from the receiving-cask into the well, in Exhibit Cherrier, that said tube might be a metal pipe or a hose, both being well known devices for similar purposes, and if so, what is the difference between the two cases?

"*Ans.* I did so state, and in the case supposed, of the substitution of the elongated tube or a hose for the funnel shown in the Bull apparatus, there would be no material difference in that respect."

This first claim is entirely at variance with the description of his mode of operation as described in his specification.

The combination of the parts in the second claim he describes as performing a function identical with that shown in the Bull original patent, the claim concludes with the following words:

"Whereby the noisome air is drawn *from the tank*, passed through the *pump and deodorized* substantially as described and shown."

The third and last claim of Scharf is so clearly the invention of Bull, that we will transcribe it.

"The process described wherein the noisome air drawn from a vault in the act of cleaning it, is taken *into a tank*,

thence *into an air-pump*, and discharged *through a deodorizer* containing chlorine or chlorides substantially as described."

In the Bull original apparatus the process is fully described and shown, the noisome air first *enters the tank, thence the air-pump*, and is discharged *through a deodorizer*, containing a *charcoal fire.*

For at least a hundred years, charcoal fires, and chemicals have been used as well known substitutes for each other in deodorizing—in the Walter apparatus filed in this case, the deodorizer there used is spoken of as *acids* or *chemicals.*

How such claims as these could possibly have been granted to Scharf in the face of the patents filed in this cause is hard to understand; and when the Court speaks of improvements which might have been *invented* by others, it meant *invented,* not merely *patented,* that it was speaking of meritorious inventors who had added some improvement to the art or process.

It is evident, however, that this apparatus was not intended to be lowered into a vault to clean a deep well, from the following clause in the specification.

"In order to ascertain when the tank or receptacle D is sufficiently filled, there may be placed in the head an ordinary float with its stem projecting through the head, or the ordinary mode of *striking upon the tank from time to time may be used,* in which mode the progress of filling may be determined from the sound."

It is hardly necessary to state that the mode of striking on the tank could not be used if the tank were down in the well. Nor is there anything from the beginning to the end of the Scharf Patent which designates any method of closing or sealing the cask. The apparatus used as described upon a wagon-body, and without a method of sealing would not infringe Bull's first claim—and where the mode of ascertaining when the tank is full by striking upon it were used, without the valve, it would not infringe his third claim. He must go outside of the things which he supposes necessary to his invention before he infringes.

The Bull Patent therefore was not re-issued to catch Scharf. He must add to his invention the float valve of the Bradley and Scharf apparatus, or the method of closing the tanks as shown in the Bradley and Scharf model, before he can be charged with infringement. It may here be stated as disclosed by the record, that Bradley and Scharf were placed in interference by the Patent Office. Bradley was the applicant, and the interference was declared between the two, when the patent was granted, it was issued to Bradley, assignor of one-fifth the interest to Scharf.

Was the patent re-issued to cover the invention of Frazier? Clearly not, the invention of Frazier as shown by his specification and claims, consist of the features of his peculiar coupling and deodorizer, nothing of this kind is claimed or described in the Bull Re-issued Patent.

It could not have been re-issued to cover the Scharf and Bradley Patent, for that patent as we have seen was not in existence for several months after the re-issue was granted.

Upon the whole then, this reissued patent was granted at a time when other improvements had not come into use, nor was it re-issued to cover inventions of others after its issue—it stands before the Court on the same grounds, and subject to the law as defined in *Seymour and Osborne* and *Brown and Guild*, and is entitled to the saving clause announced in *James vs. Campbell*, where the claims of the original patent did not fully assert or define the patentee's right in the invention, and his application for a re-issue was made, "before adverse rights had accrued."

The case has none of the obnoxious features, upon which this Court has passed its censure.

It is not like the case of the *Swain Turbine Co. vs. Ladd*, wherein the patentee had claimed a specific device in a well-known class of water wheels, and after waiting for twelve years re-issued it, and claimed an entire water wheel.

It has none of the features of the case of *Johnson vs. The Flushing and North Side R. R. Co.*, where the invention in the original patent was for an "improved mode of fastening

sheet metal on roofs," &c., when after waiting fifteen years, it was reissued to capture, all the fish-plates on railroads which had come into general use in the meantime. It is clearly nothing like the case of *Miller vs. The Bridgeport Brass Co.*, where the patentee's invention was a failure with the two domes without the chimney, as patented, waited for fifteen years to discover that the chimney with one dome was his invention, notwithstanding one object of his original invention, was stated to be to dispense with the chimney.

Nor is it like any of these later cases; it is the case of a meritorious invention reissued within a reasonable time, to cover only that which was substantially indicated and suggested in the original patent, to define more clearly the patentees rights, to embody them in a more perfect description, and claim, and this we understand the Court to declare may be done, in the case of *Marsh vs. Seymour*, decided in 1877—*Ball vs. Langles*, *in* 1880; *The Swain Turbine Co. vs. Ladd*, in the same year, *Miller vs. The Bridgeport Brass Co.* and *James vs. Campbell*, *in* 1881.

In a case like this we understand the law to be as defined by this Court, that a patentee may redescribe his invention and include in his specifications and claims, whatever was indicated or suggested in the specification, claims, drawings, or Patent Office model, which properly belonged to the invention as actually made and perfected, without new matter.

Marsh *vs.* Seymour, 97 U. S., p. 356.

Ball *vs.* Langles.

James *vs.* Campbell, 104 U. S., 371.

Swain Turbine Co. *vs.* Ladd, 19 O. G., 62.

The questions therefore which we will present to the Court for consideration will be.

1st. Does the re-issued patent contain anything more that what was suggested, and fairly indicated in the original patent?

2nd. Has any new matter been introduced?

As to the first question, we ask the Court to take the original patent and examine it.

The first thing which strikes the attention, is the fact stated that the invention relates to an improvement, whereby night soil may be "*removed and utilized.*"

He then proceeds to describe a vault to be cleaned. Then says, "*B* represents one of *several casks or receptacles* for removing the fæcal matter from the vault."

It has located at its lower extremity the funnel o, *which fits air-tight* upon the *neck*, *i*, and the valve *d*, which opens upwardly ; at its apex *the float-valve f* is provided, which *screws* upon or is otherwise caused to *fit air-tight* upon the neck M." * * * * * "The lower part of the float-valve is made of cork or other light material, in order that when the cask or receptacle *becomes filled* by the action of the suction-pump it may press against *the orifice of the tube*, and thereby prevent the contents of the vault *A* from overflowing or extending *beyond the cask B.* * * * * * * *V*, represents *one of a series* of caps, which are *screwed upon the neck or necks* of the cask *A*, when filled by the action of the suction-pump. He then describes the operation of his apparatus, the seat or floor is removed, the *receptacle* B is suspended over the opening, then lowered until the funnel *O* enters the fæcal matter about ten inches, "whereupon, by operating the suction-pump, the *receptacle or cask* becomes filled with the feces until it reaches the float-valve *f*, which presses against and *closes the orifice of the tube leading to the pump.* The valve *d* then falls and prevents the escape of the contents of the cask. In the meantime the air that is *pumped out* of the *receptacle B* is forced into a furnace located over the suction-pump, whereby the odor arising therefrom is destroyed. When *one receptacle* is thus filled the valve *f* is removed and the cap V *screwed thereon*, whereupon the operation *is repeated* by the employment of *another cask*, until the vault is emptied of its contents."

By examining the model of the Bull Patent filed by the Defendants in this cause, it will be found to be constructed in cylindrical form, with the necks *i* and *m*, formed thereon

one at each end of the cask, and *two caps* of the series *V*, one of which fits on the neck *i*, and the other on the neck *m*. The screws are not on the necks but are described in the specification by the language "*V* represents one of a series of caps which are *screwed upon* the *neck or necks* of the casks."

It seems to us impossible that a careful reading of this patent will not disclose that its leading features—those features to which its whole success is due—are, its capacity to be handled in or about any vault, to be brought directly to the vault to be cleaned, to be lowered down, if the well be too deep to be otherwise cleaned, to adapt itself to any shape or form of privy or vault, and whilst operated to be provided with automatic means of preventing the filth from "extending beyond the cask *B*," by the float-valve, "which presses against and closes the orifice of *the tube leading to the pump*," to be able to securely close and seal it by means of the caps and screw-necks, to remove disagreeable odors from the cask whilst being filled, and when filled and closed to handle it, "whereby the night soil therein contained may *be removed and utilized*."

It is equally clear that the specification was defective and did not secure to the inventor the true gist of his invention nor assert his rights therein. The Commissioner of Patents has so decided, and with this presumption in favor of Com plaints the expert for defence was never asked whether the specification was or was not defective or insufficient.

The first question whether the specification contains any other or different invention, has been determined by the Commissioner of Patents and three judges of the United States Circuit Court, was commented upon and testified to by the witnesses and upon this point we ask to use as our own argument Mr. Renwick's clear and lucid testimony as given on *pp.* 120 *and* 121, of the record:

"4*th Inter*. Look at Complainant's Exhibit Bull Patent and compare the same with Complainant's Exhibit Reissue, and state whether you find in said Reissued Patent any

matter or thing not shown or described in the original Bull Patent?

"*Ans.* I have compared them repeatedly, and do not find any matter or thing in the reissue which is not shown or described in the original.

"5*th Inter.* I call your attention now to a portion of the second paragraph on the second page of Complainant's Exhibit 'Reissue,' and to the following words in said paragraph: 'Whereby the movable cask may be located *in any desired position,* with relation to the vault.' In your opinion, does the statement of this passage introduce any new feature or device not shown in the Complainant's Exhibit Bull Patent? In answering this question, refer, if you please, also to the induction-pipe described on the right hand column near the top, and also near the bottom of the right hand column on page 2, the statement, that 'the operation of transferring the offensive matter to the cask is wholly performed within or near the privy,' and also to the statement in the first claim of said Reissue Patent, as follows: 'Whereby the movable cask may be located in any desired position with relation to the vault and privy,' and give your reasons for any opinion you may express?

"*Ans.* In my opinion, none of the extracts from the reissue, quoted in the question, introduce any new feature or device not shown in Complainant's Exhibit Bull Patent. The two quotations, which state that the cask may be located in any desired position with relation to the vault and privy, are, as I understand them, statements that the cask may be located in such desired positions, within the capacity of the apparatus, that is to say, that the cask may be lowered to greater or lesser extent in the vault as required, or lowered in different parts of the privy, or outside of the privy, if the vault extends outside of the building. It does not mean, for instance, that the cask might be put on top of the privy, or on the roof of the building of which the privy is an appurtenance, although that might be a desired position.

"The statement which I understand to be referred to, near the top of the right hand column of the second page, is as follows:

"'The induction pipe O is secured to the proper screw-neck on the cask, and it constitutes a tubular connection with the cask,' etc.—this is a sufficiently clear description of the funnel O, described and represented in the drawings of the original patent, which funnel is, as it appears from the original patent, an induction pipe and a tubular connection with the cask; all this passage does, is to describe the funnel in different words, and words relating to its functions in the apparatus.

"The paragraph on the same column near the bottom thereof, commencing, 'the operation of transferring, etc., is wholly performed within or near the privy,' does not, as I can see, enlarge the reissue beyond the original patent. I have seen many privies where the vault extends beyond the building, in such a case, Bull's apparatus could be used wholly outside of the privy. If in another kind of a privy, the building was big enough, the pump, deodorizer and cask could be put entirely within the building, and the original Bull patent shows part of the apparatus within the privy and part near it."

The above question and answer were addressed to the only points of enlargement which the expert witness for the defense could find as he says in answer to the 15th interrogatory on p. 83 of the record.

"The particular points in which the reissue seems to go outside of and beyond the original invention are—first, in describing the receiving-tank as being capable of being located in any desired position with relation to the vault; second, in describing the rigid funnel at the bottom of said claim in such a way as to make it the equivalent of *a flexible tube or hose;* and third, in describing the tank as being capable of being rolled or trundled upon its end, in the same manner that barrels ordinarily are."

Not a word of cross-examination of this point occurs, the statement of Mr. Renwick was allowed to remain without review.

2*nd.* Was there any new matter introduced into the re-issue?

The specification of the re-issue illustrates how defective was the original and points out clearly the true invention, it begins by stating the known methods in use prior to the date of the patent, and then points out the real invention of Bull, and the efficacy of his invention as distinguished from those; then follows the description of the invention, and then the function and mode of operation it concludes with three claims, the first of which is a combination of parts to effectuate the handling of the device, the second is not in suit, and the third is a combination of elements or devices by means of which the workman is notified when the cask is full, and the filth is prevented from entering the air-pipe and pump.

These two claims the 1st and 3rd divested of the function as explained therein are as follows:

"1st. *A privy-vault cleaning apparatus consisting of an air-pump, a deodorizer, and suitable tubular connections, in combination with an independently-moveable receiving-cask, having an induction passage or opening, and also an air-opening, for receiving sealing caps or covers, substantially as described.*"

"3d. *The combination with a portable night-soil cask, of a float-valve located at the air-passage, substantially as described.*"

In the preparation of the re-issued specification it was thought proper and necessary to show to some extent the state of the art, in order that the true merit of the patent might be limited to the precise invention; the examiners in the Patent Office, Messrs. Dyrenforth and his assistant Mr. Stocking, believing this to be new matter wrote a letter to this effect to Mr. Wood the solicitor who made the application for the re-issue; this letter and Mr. Wood's reply are in the record on page 227. Mr. Wood's reply we here insert as it shows conclusively the object, of *re-describing* the inven-

tion, and we place in italics those parts of the letter which convinced the examiners of their error, and upon a reconsideration they withdrew their objections, the letter is as follows:

"Hon. Commissioner of Patents.

Sir:—Office letter of January 15, 1876, is received. Applicants' attorney *disclaims any intention* to introduce "new matter" as understood by him *to be embraced by the words "new matter" in the statute*, or as interpreted by the well established practice of the Patent Office.

The matter objected to is entirely in the nature of a *disclaimer*, in that it recites the *pre-existing state of the art.* Moreover, such statements clearly point out, that which is new from that which is old, and instead of deceiving the public as suggested by the letter, serve to enlighten it. *If there be any unfair or untrue allegations, as to previous state of the art they will be gladly corrected when pointed out.*

Statements as to comparitive utility are always in order, for unless *some utility is shown*, the patent would be at least no *prima facie* evidence of the prime requirement for a patent.

It is alleged by the office that the *recital of previous state of the art,* "does not appear from the original patent to have been of his (inventor's) knowledge or intention." If this were good ground for rejecting such matter, *no disclaiming clause* could be inserted in a re-issue, because the matter disclaimed was originally claimed, and the inventor did not show that he originally intended to disclaim. In cases like applicant's it requires a comprehensive statement of the pre-existing state of the art, and a comparison of his invention with those preceding in order to impart fully, a knowledge of novelties existing therein and of their practical value. It is respectfully requested that the office *reconsider its action or cite some instances,* (if any exist,) in office practice among published decisions on which the present action may be fairly based."

Upon reconsideration the Examiners concluded they were wrong and yielded to Mr. Wood's explanation on the sub-

ject, as is shown by the fact that the clauses still remained as originally framed.

It is evident that the Examiner mistook *new words* and new sentences and explanations for *new matter*, the term new matter has been clearly explained by Mr. Justice Bradley in delivering the decision of the Supreme Court in the recent case of the

Powder Co. *vs.* Powder Works, 98 U. S., 138.

"The specification may be amended to make it more clear and distinct; the claim may be modified so as to make it more conformable *to the exact rights of the patentee;* but the invention must be the sume * * * * , and by 'new matter,' we suppose to be meant *new substantive* matter, such as would have the effect of changing the invention, or of introducing what might be the subject of another application for a patent."

Another objection by the examiners, to the words "flexible tubular connections;" connections in the *plural* seem to be the only cause of objection, as the letter states. "But one flexible tube appears *i. e. that connecting the cask to the pump.*"

He is told that the drawings give color to this inaccuracy in the text, and he is then told.

"The first claim the statement of the invention might well be made to express without ambiguity, the fact that the *pump* and *deodorizer* are not movable with respect to each other."

This letter is inserted on p. 228 of the record, is dated Feb'y 7th, 1876; the answer to it seems to be out of its place in the record, it is inserted on pp. 217 and 218.

This letter promptly yields to the request of the examiner, it says:

"The drawings *have been corrected* at point indicated by office letter of Feb'y 7th, 1876. The objections to the word "connections" as originally employed, appears to be well founded.

That there are two tubular connections there can be no doubt, and with the amendment herein presented it is believed that the claim will be allowed."

At the top of *p.* 18 appears the amendments.

Amend specification as follows:

Page 5, line 13, *erase flexible.*

Page 6, line 17, after cask insert.

"The induction pipe O is secured to the proper screw-neck on the cask, and it constitutes a tubular connection with the cask, through which the offensive matter is conducted from the vault to the cask."

Page 6, line 23, after funnel-pipe insert "connection."

Amend first claim by erasing word "flexible."

With these amendments the patent is granted.

Will the Court compare these proceedings, beginning on January 11th, 1876, and ending on February 29th, 1876, with the struggles of Bradley *before the same examiners* in the patent office, from August, 1875, to July, 1876.

The record shows that, the Commissioner has determined that the specification was insufficient and required amendments, he has determined that it was so formed from inadvertence, accident or mistake, and without any fraudulent or deceptive intention; that the re-issue is for the same invention as contained in the original, that no new matter has been introduced; one of the most careful, painstaking and conscientious experts in the country has recorded this as his opinion under oath; three judges of the United States Circuit Court, have agreed with the Commissioner and the expert Mr. Renwick; can it then be said that on the face of the patent any thing to the contrary is shown?

We respectfully ask the Court to take the drawing of the original Bull Patent with its description and examine it. This drawing it will be seen, represents the cask inside of the vault-house slung upon the end of a block and tackle—from the top of the cask a flexible pipe connects it with the pump, and the pump and deodorizer joined together are in the yard outside of the privy-house, the float-valve *f* which

indicates to the workmen when the tank is full, and prevents the flow of matter into the air-pipe leading to the pump is both shown in the drawing and described in the specification. The screw-necks are there, and the caps for closing tightly the cask shown and fully described, every thing necessary to take the apparatus to, in and about the privy, to clean it out at any depth, to handle it, close it securely, and take it away to utilize it. Now suppose this well is not too deep to be cleaned without lowering the cask down into the vault, can it be that invention is required to take the cask off of the block and tackle—attach a pipe longer than the funnel O, to the neck *i*, drop it down into the fæcal matter, and then work the pump in the same way until the cask is filled?

It is the same cask with its appurtenances, the screw-necks, float-valve, caps and flexible pipe, from the cask to the pump, that it was in its original position, and to change its place and put a longer pipe to it, would simply be a work which any mechanic, nay any workman would do without a moment's reflection. Now the device in the precise form in which Bull constructed it, contains the valve *d*, at the bottom just over the orifice, this valve *d* is there only because the orifice is at the bottom, it performs no function in forming the vacuum, it would be absolutely unnecessary if the inlet orifice to the cask were placed anywhere else in the cask, its function where it is, is solely to form a practically solid bottom when the float-valve indicates that the tank is full, its purpose and only purpose is to hold the matter in the cask until the cap is secured upon the neck *i*, and then its function ceases altogether, could it possibly have required invention to make a solid bottom to this cask, either by fastening down the valve, or forming the bottom without an orifice, and then place the orifice in the top of the cask? would not any mechanic have done this without inventive thought? and when this is done, does not the apparatus work in precisely the same way? the same cask, the same appurtenances manipulated and handled in the same way, slung

to a block and tackle in the same way, filled in the same way, the process of filling stopped in the same way, the float-valve located in the same place, for the same purpose, performing the same function, the cask closed in the same way, handled in the same manner, and the contents transported and utilized after the same fashion.

Now will the Court look at the Scharf, the Frazier, or the Bradley and Scharf apparatuses, and see if there is any addition to the Bull apparatus or any subtraction therefrom except the simple changes which any mechanic or workman would have made after seeing the Bull apparatus, they work in the same way, the orifices are closed in the same way, the filling process stopped in the same way; can be lowered in a deep vault by attaching a sling and hooking it to block and tackle, all and every thing which makes Bull's invention valuable and constitutes its chief success, are present in their apparatuses, with only such changes of form and location as a mechanic would naturally have made without the exercise of the inventive faculty.

Can it be possible that the clause in the Constitution giving to Congress the power *to promote* the progress of the useful arts by securing to inventors the exclusive right to their discoveries, was intended by its framers to allow a meritorious inventor to be defeated, by such changes in his invention which required no more thought than stopping up a hole in a cask, and changing the location of a pipe from one end to the other? Can it be that Congress intended that an inventor's right, could be thus easily invaded, by such additions as changed in no respect the chief features of the apparatus, and may it not fairly be inferred that the clause in the statute was intended to allow an invention to be redescribed in cases like the present, in order that the inventor might not be defeated by just such immaterial changes as are shown in this case.

Scharf's apparatus as limited by his description never has been seen.

Frazier's Patent is but an addition to Bull's, Bradley and Scharf's Patent was granted after a year's struggle to get from the Examiners a claim containing any merit, whilst he was told three times he was attempting to obtain Bull's invention. He patched up his interference with Scharf by giving him one-fifth interest in the patent, and how it was with Frazier no one knows.

The real merit of introducing the system into this country is due entirely to the Complainant company; and the country was flooded with these machines, only when the real merit of the Bull invention excited the cupidity of those who were willing to reap where others had sown.

Where it is sought by the defence to introduce Bull to diminish the value of the re-issue in the hands of his assignees, we respectfully ask that he be not heard—certainly it would be inequitable to hear him in contradiction of his own oath filed in the Patent Office, that he verily believed that by reason of an insufficient or defective specification, his original specification was inoperative or invalid, that the said error had arisen from inadvertence, accident, or mistake, and without any fraudulent or deceptive intention; and that he believed himself to be the first and original inventor of the improvement set forth and claimed in the amended specification. See his oath at the top of p. 219 of the record.

He has sworn that he received a large and valuable consideration for the assignment of these Letters Patent.

In the *4th edition of Curtis on Patents, page* 628, *sec.* 475, Mr. Curtis uses the following language in stating the law on the subject.

"But where the inventor has parted with his interest in the Letters Patent, e. g. by assignment, any subsequent declarations made by him are *wholly inadmissible* either to show a want of title in him, or to affect the *quality of the article*, or to impair *in any way the rights of the assignee.*"

Upon the subject of infringement, little or nothing was urged in the Court below by the defense; as stated by the

Court in the opinion filed, the infringement was admitted. It may not be amiss, however, to quote a portion of the testimony of Mr. Morrill and Mr. Renwick on this subject:—the italics are our own and not in the original.

Mr. Morrill is shown the Complainant's Exhibits, "Bradley," Frazier, and "Frazier No. 2." He explains on *p.* 19 of the record, the mode of working and using these apparatuses which is nowhere contradicted; on p. 20 he testifies as follows:

"*4th Inter.* Is the air forced through the deodorizer during the entire process of working the apparatus, or not?

"*Ans.* It is.

"*5th Inter.* I see in both these exhibits, Bradley and Frazier, that the barrels are glued or otherwise fastened in some way to be board; is this so in actual practice, or not?

"*Ans.* *It is not*—it is only done for convenience in handling the model.

"*6th Inter.* What do you do with the barrel after it is filled?

"*Ans.* The barrel is closed up by means of the sealing cap, and is removed by some suitable conveyance."

Mr. Renwick's testimony on the subject of infringement is given at length on pp. 21, 22, 23, and 24 of the record. He is cross-examined at length on pp. 25 and 26.

In re-direct examination he is asked as follows, *p.* 27:

"*1st Re-direct interrogatory.* What would be the mode by which, in practice, the contents of a well forty feet deep are removed by the apparatus represented by the Keizer 'reissue' patent?

"*Answer.* Not by the use of a 40-foot suction-pipe, but by lowering the cask into the vault, so that it was not more than twenty or thirty feet above the level of the fæcal matter in the vault—the suction-pipe dipping into the fæcal matter.

"*2d Re-direct inter.* How would you remove the contents of a privy-vault, forty feet deep, by using either of the apparatus represented by the models Bradley and Frazier?

"*Ans.* In the same way as I would proceed with the Bull apparatus, by slinging the cask and lowering it so far into the vault that the pressure of the atmosphere would be sufficient to drive the fæcal matter up the suction-pipe into the cask when a vacuum was formed and maintained in the cask."

Mr. Renwick gave these opinions as a skilled expert acquainted with mechanics, the action of pumps, pressures, &c. and in cross-examination he was asked if he had ever seen an apparatus operated on the vacuum principle at work cleaning privy-vaults? To which he answered:

"No, not that I remember."

When Mr. Renwick was recalled upon the stand he gives the following history, of actual work done with these apparatusee, parts of which we will place in italics. We quote from *p.* 119, *et seq.*:

"1*st Interrogatory.* Since your last testimony was given in this case, have you seen an apparatus operated on the vacuum principle, at work cleaning privy-vaults, and if yea, state what you saw?

"*Answer.* I have seen an apparatus working on the vacuum principle here in Baltimore, on Wednesday, May 1st. The first trial was with an ordinary wooden cask with iron heads, with an air opening, provided with a screw-neck and cap, for attachment of the hose leading to the air-pump; the other end of the cask was provided also with a screw-neck, to which a funnel-shaped pipe was attached; the cask was further provided with a check-valve, the cask and its appurtenances being like those referred to in the second claim of the Bull Reissue. This cask was slung from a tackle, and connected by an air-hose with an air-pump, which was provided with a deodorizer; the cask was then lowered into the privy-vault, until the funnel-shaped pipe entered some distance into the fæcal matter; the air-pump was then worked, making and retaining a partial vacuum in the cask, and the cask was filled; the float-valve, which I have omitted to describe, shutting the air-passage when the cask was full, and

informing the workman that it was filled, by the additional force required to move the brakes of the pump. The cask was then hoisted out, and I ordered it left hanging for some time, to see if there was any leak from the check-valve. There was no leak, and after hanging a while, the funnel-shaped pipe was unscrewed and a cap screwed on in place of it. The cask was then lowered to the floor, and the air-hose unscrewed and a cap screwed on to the screw-neck of the air-opening. The cask turned out, on examination, to be quite full. We next tried an experiment with the same cask, same pump, air-hose and same deodorizer, but instead of using a funnel, *we screwed an ordinary suction-hose on to the induction-passage.* This hose was passed down through the hole in the privy-seat *until the bottom of the cask rested on the seat;* the pump was then worked, and the cask filled as it was before. We then hooked a tackle on it, lifted up the cask, unscrewed the suction-hose, left the cask hang to see if the check-valve leaked, and finding it did not, *screwed the cap over the induction aperture,* lowered the cask down on to the ground, uncoupled the air-hose, *screwed the cap on to the air-aperture, and moved the cask away.* The third trial was with the *same air-pump, air-hose,* and *deodorizer,* but the barrel, (although itself like the other barrel,) had both the openings *in the same head* and no check-valve; *it was a regular Bradley barrel, with its appurtenances.* A short length of suction-hose was then attached to the suction-nozzle, and the cask was slung and *lowered down into the privy, until the hose entered some distance into the fæcal matter,* when the pump was worked and the cask filled. When full it was hoisted out, *the air and suction-hose disconnected, and the caps screwed on.* After this, we tried the same cask with a sufficiently long suction-hose, the cask standing outside of the privy, as it is usually worked, and filled it in that position. All the trials were perfectly successful, the cask being filled in all cases, and no slopping over or leaking of the fæcal matter in any instance.

"In now looking at my memorandom book, I find that the experiments with the Bradley cask were tried first, instead of last in order.

"2*d Inter.* In cleaning the privy that you have just described, and in the different manners set forth in your last answer, was the operation of transferring the offensive matter to the cask wholly performed within or near the privy?

"*Ans.* It was. It was never performed entirely within, because the privy building was very small, and we had in all cases the air-pump and deodorizer outside of the privy building.

"3*d Inter.* From what you have seen of the operation of the apparatuses you have described, have you in any way changed your opinion, as given in your former testimony in this cause?

"*Ans.* I have not."

Mr. Bull has himself sworn that the first apparatus used by him was a wooden cask with iron hoops and heads.

It will be remembered by the Court (and we hope not to our prejudice) that the Bull patent was reissued, this suit brought, testimony taken, the case tried and decided, before any of the late decisions of this Court relating to laches had been rendered. The reissue was applied for in January, 1876, the decision rendered by the Circuit Court, Sept. 8th, 1879. The first of what are known as the reissue cases, viz.: *The Swain Turbine Co. vs. Ladd*, 19 *O G.*, *p.* 62, was decided by the Supreme Court, *Dec.* 13*th*, 1880.

We most respectfully yet earnestly ask that the Court hear us upon the question which the date of the reissued patent bears to the date of these recent decisions, not by way of fault-finding, and certainly not intending to question either the right or the wisdom of the Court in changing its ruling. We hope that the important interests at stake will be regarded by the Court as good reason for this argument addressed to the law and equity of Complainant's case.

And the question to which we ask the Court's attention is this:

In view of the fact that the reissue was obtained prior to the late ruling of the Court, may we not equitably and fairly ask that the Complainant be regarded as standing before and under the law as it stood when the reissue was applied for and granted, or to put it more clearly, let us suppose the statute to have been repealed after the reissue had been granted, would not the Complainant have had a vested right in his reissue, in all respects, to the extent of the law as it existed at the time, as construed and explained by this Court? or would a change in the ruling of the Court have any greater effect upon those rights than would be the case had the statute been repealed?

The law as it stood when this patent was reissued, was as follows:

In the case of *Stimpson vs. Westchester R. R. Co.*, 4 *How.* 380, the reissued patent was acquired after the original,	4 years and 1 months.
In *Wilson vs. Rousseau*, the patent reissued during an extended term, after the original, 4 How. 646,	17 years.
In Battin & Taggart, 17th *How., p.* 74,	6 years.
In *Burr vs. Duryee*, 1 Wal. 531,	
1st reissue,	10 years.
2d "	14 years.
Agawam Co. vs. Jordan, 7 *Wal.* 583,	
1st reissue,	10 years.
2d "	38 years.
Morey and Lockwood, 8 *Wal.* 230,	8 years.
Rubber Co. vs. Goodyear, 9 *Wal.* 788,	
1st reissue,	5 years.
2d "	16 years.
Seymour & Osborne, 11 Wal. 516,	
1st reissue,	9 years.
2d "	10 years.
3d "	13 years.

Washing Machine Co. vs. Tool Co., 20*th Wal.* 342,	9 years.
Brown vs. Guild, 6 *O. G.* 392, two patents, each reissued in 5 separate divisions:	
On 1st patent, 1st reissue,	5 years.
2d "	7 years.
On second patent, 1st reissue,	2½ years.
2d "	5 years.

In the case of *Wilson vs. Rousseau*, the Court passed an order of which the following is

Section 10. "That the Commissioner of Patents can *lawfully receive a surrender* of letters patent, for a defective specification and issue new letters patent upon an amended specification, *after the expiration of the term for which the original patent was granted*, and pending the existence of an extended term of seven years, and that said surrender and renewal *may be made at any time during such extended term.*"

The italics in the above quotation are our own, as well as those which follow in others.

In the case of *Battin & Taggart*, the Court below said:

"1. That a description by the applicant for a patent of a machine or a part of a machine, in his specification, unaccompanied by notice that he has rights in it as inventor, or that he desires to secure title to it as patentee *is a dedication of it to the public.*"

"2. That such a dedication of it cannot be revoked after the machine *passed into public use*, either by *surrender and reissue or otherwise.*"

This decision is reversed by the Supreme Court, on appeal, in which this Court says:

"The above instructions we think *were erroneous.* . . .

"So strongly was this remedy of the patentee recommended by sense of justice and of policy that this Court in the case of *Grant vs. Raymond*, 6 Pet, 618, sustained a re-issued and corrected patent, before any legislative provision was made on the subject. In that case the Chief Justice said: 'It

will not be pretended that this question is free from difficulty. But the executive departments, it is understood, have acted on the construction adopted by the Circuit Court, and have considered it as settled.' . . . .

"How much stronger is a case under the statute which secures the rights of the patentee by a surrender, and declares the effect of the reissued and corrected patent? By the defects provided for in the statute, *nothing passes to the public from the specifications or claims within the scope of the patentee's invention.*"

In the case of *Burr vs. Duryee*

The case was decided on a question of infringement—the Court says: "The machine of Boyden has *not one* of the peculiar devices or combination of devices of the Wells machine. . . . .

"No one who reads the two specifications can aver that they contain the same combinations or devices, or equivalent or mode of operatien."

In this case the practice of re-issuing patents with expanded claims was for the first time pointedly rebuked, but although the reissue was fourteen years after the date of the original patent, the Court say nothing on the subject of laches.

The effect of this case was to call attention to the subject of re-issued patents, and the case which immediately succeeded this one was the case of

The Agawam Co. vs. Jordan, 7 *Wal.*, 583.

In this case the re-issued patent was sustained, although the re-issue sued upon was granted 38 years after the original, and the Court say nothing on the subject of laches.

Following this is the case of *Morey vs. Lockwood*, where the patent was reissued eight years after the date of the original.

It appeared from the circumstances of the case that the inventors were led into error by the Commissioner and took the original patent, with less than they were entitled to, the Court says:

"We doubt not that the Commissioner had full authority to grant the amendment; and under the special circumstances of the case it would seem to have been a duty."
* * * *

Then followed the *Rubber Co. vs. Goodyear*, in which the reissued patent was sustained, and the Court say: "Patents should be construed in a liberal spirit to sustain the just claims of the inventor."

The case of *Seymour and Osborne* followed this, in which case the Court declare, "That the patentee may redescribe his invention and include in the description and claims of the patent not only what was well described before, but whatever was suggested, or substantially indicated in the specification, drawing, or patent office model which properly belonged to the invention as actually made and perfected."

The *Cornplanter* case followed, and at the date when this reissued patent was granted a long line of reissued patents had been sustained by this Court, varying in the time of reissue after the original patents from four years and one month to thirty-eight years.

We earnestly ask the Court to say that, under the circumstances, the reissued patent should be considered in the light of the law as it stood at the time it was applied for and granted.

Comparing the two patents on their faces the reissue is undoubtedly good, it is the same invention redescribed; it includes nothing more than was substantially suggested and indicated in the original. The Commissioner of patents has so determined; the expert for the defense has not sworn to the contrary; the expert for the Complainant agrees with the Commissioner, the Circuit Judge agrees with both.

The reissue was obtained without undue delay, applied for before adverse rights had accrued, before the apparatuses had come into use. The infringing machines were thrown on the market by Jerome Bradley, under a patent which was obtained five months after the application for the reissue by

Complainants, and four months after the reissue had been obtained. The Bradley patent, under which the Defendant claims the right to use his machine, had been repeatedly rejected by the Patent Office on reference to this very patent of Bull's and to others belonging to the Complainant Company, of which, as a corporator, director and owner of one-fourth of the stock, he had full knowledge; after his long struggles with the Examiners, he is placed in interference with Scharf; the interference is patched up, and Scharf receives an assignment of one-fifth interest of the Bradley patent. If Scharf had conceived an idea that his own patent had been of any value, with the Bull patent antedating him four years, it can hardly be believed that he would have yielded in the interference for a one-fifth in the Bradley patent; his apparatus had never been seen; it had not made its appearance, and four months after the Bull reissued patent had been granted, he and Bradley compounded their quarrels in the Patent Office and flood the country with devices which the Patent Office had four times declared, described inventions belonging to Bull; specification after specification had been erased, amendment after amendment had been made, until he was forced to change his attorneys; his new attorneys fare no better; he was still encroaching on Bull, and this, in the opinion of the very Examiners who granted the Bull reissue, without an erasure, except a word or two which was at once seen and conceded by Bull's attorney.

Bradley was also placed in interference with Frazier; how it was fixed we do not know; he brought suit in the Circuit Court for the District of Maryland against Frazier for infringement and abandoned it; Frazier's Patent was granted October, 1875, the devices claimed therein may well exist by the side of Complainant's patent as mere additions thereto, if there was anything novel in them, and the machine would still be an infringement thereof; the defendant himself gives the date at which the machines were introduced, he purchased his own in the latter part of 1877, and worked for Minks who had a machine about a year before that; and

this defendant with a knowledge of the time of their introduction quite equal to that of any one in the case, swears that this machine was the first one in Baltimore; it was bought from Bradley in Philadelphia about the latter part of 1866; it cannot be possible that Frazier who lived in Baltimore had introduced his machine before that time; if he had, it is certain that some one of all the witnesses, and parties in the case, would have heard of it. The patents of Scharf and Bradley and Scharf, so far as any valuable part thereof is concerned, would be void as having been the invention of Bull; for all else that the patents contains, any mechanic would have made the changes without the exercise of invention; the patent to Frazier is in the same condition, unless his peculiar coupling and deodorizer may have some merit; certainly no one will say that a valuable patent may be infringed by transferring a tube from one end of a cask to the other; the apparatuses are the same; they have the same appurtenances, they are placed thereon for the same purposes, they are worked in the same way, closed in the same way, transported in the same way; they form a continuous vacuum in the tank, ean be placed outside of the privy, within the privy, or part inside and part outside; the casks may be placed on the seats with the tube leading down into the vault, or they may be slung on a block and tackle and lowered into the vault; the same float-valve indicates when the cask is full, stops the flow; and tells the workmen when to stop the brakes; prevents the flow of fæcal matter into the tube and pump; it is located in the same place and for the same purpose. The only two apparatuses working on the vacuum system prior in date to the Bull Patent were absolute failures; those two were the Cherrier and the Walter.

The Cherrier was never used by any one, and never seen in this country, so far as we know; in this apparatus no vacuum was formed in the cask in which the matter was carried away, it could not be brought near the ordinary privies as constructed here; it could not empty a vault of more than twelve feet in depth; its complications made it value-

less. The Bull apparatus dispenses with more than a dozen of its necessary parts, and marks the difference between success and failure, due to the differences in their construction and mode of operation.

The Walter apparatus was better than the Cherrier, but was no less a failure; it could not maintain a vacuum in the cask, and could not fill the cask full; it could not approach near enough to the privies to be practically useful; it could not empty the contents of a well more than twelve or fourteen feet deep; it carried a pump with every tank; since the patent was granted no one has ever seen one.

Neither the Walter nor the Cherrier has a float valve to stop the pump brakes, nor was such an arrangement of any use to either.

The apparatus on the forcing system are still less to the point, they certainly have no influence upon the invention of Bull.

It cannot be denied that the equities are with the Complainants as well as the facts; when the company began, there was no system in vogue in this country, it undertook the task of breaking new ground and introducing a system which was felt to be a public necessity; the labors of prior inventors were failures; they did not meet the wants of the community; the expense and labor of beginning work in a new field of operations is too well known to require comment. The success of the company excited the cupidity of others; it had made the system a success, due to its own energy and the merit of the inventions. When the success was seen and appreciated; when the labor had been done and the money expended; when the Bull patent had been reissued, one of its own directors flooded the country with infringing devices—devices following directly in the path, taking the same course and constructed with all the features of the Bull invention as described, in both his original and reissued patents—a patent tribute to the merit of the Bull device of itself.

The patent of Bull was re-issued to him with scarcely a correction, re-issued after full examination by the same examiners who erased every line of the specifications of the Bradley application, and rejected his claims at least three times, it was re-issued without unreasonable delay, before it had gone into general use; the public were not injured. We must respectfully and earnestly ask the Court to affirm the decision below.

Respectfully submitted,

BENJN. PRICE,

for Appellees.

109-641

Supreme Court of the United States

No. 136. October Term, 1883.

WILLIAM E. CLEMENTS, *Appellant,*

vs.

THE
ODORLESS EXCAVATING APPARATUS
COMPANY.

Brief for Appellant, in Reply.

HECTOR T. FENTON,
Counsel for Appellant.

PHILADELPHIA:
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1883.

SUPREME COURT OF THE UNITED STATES

WILLIAM E. CLEMENTS,
Appellant,
vs.
THE ODORLESS EXCAVATING APPARATUS COMPANY,

No. 136.

ARGUMENT FOR APPELLANT, IN REPLY.

1. Elaborate argument is submitted on behalf of the appellee in the endeavor to show that no adverse rights accrued to the appellant and those under whom he claims, between the date of the Bull Original Patent and the reissue thereof.

The argument is founded on a partial statement only of the facts. The following is a full and complete statement:

The corporation appellee was organized in 1874, Bradley being one of its directors. It then acquired the Straus Patent for a device operating on the "forcing" system. It did not get title to the Bull Original Patent until October 4, 1875 (see record, page 236). The Scharf Patent was applied for November 23, 1874, and granted January 12, 1875. The Bradley Patent, dated July 18, 1876, was applied for June 29, 1875. The Frazier Patent is dated October 5, 1875. *The*

application for the Bull Reissue was filed AFTER *all three, viz., January 11, 1876.* The appellants' apparatus was made, sold, and used, not under the Bradley Patent alone, but under both it and the prior Scharf Patent; and the Bradley specification expressly admits that the invention therein described is an improvement upon Scharf. Both patents are owned in part by Bradley.

So that a comparison of the dates shows, not that Bradley attempted to patent what had been previously granted to Bull, but that the appellee attempted, by a reissue application in the name of Bull, filed January 11, 1876, to cover, by ingenious changes of description and expanded claims, to patent what had been previously patented to Scharf, January 12, 1875, and previously applied for (June 29, 1875) by Bradley, and also described in the prior patent of Frazier, dated October 5, 1875.

That the Scharf Patent was in the mind of the draughtsman of the Bull Reissue specification there can be no doubt. Indeed, so thoroughly had he become saturated with it that the very phraseology, in part, of the Scharf specification is inserted into the Bull Reissue specification, viz.: the words "independently movable," used in describing the receiving-cask, which is *now* alleged to be the distinguishing feature of the Bull cask, (see Renwick's testimony, ques. 86 to 92, record, page 146.) In brief, the appellees' case may be fairly stated in this language: That although you (the appellant) and others had acquired rights under the Scharf Patent; and although the *original* Bull Patent did not interfere with Scharf's Patent, nor contain claims covering apparatus constructed in accordance therewith, yet it might readily have been made to do so by changes of phraseology in description, omission of certain parts, changes in the arrangement of others, and subdivisions of the combinations originally claimed; and although you (the appellant) have acted under your acquired rights, and bought and used the Scharf, and Scharf & Bradley and Frazier apparatus, with a clear right to do so, as the record then stood, know-

ing that the Bull Original Patent did not describe or claim such apparatus; yet we (the appellees) have *since then* (October 1875), bought up this Bull Patent, and though not wishing to make the apparatus therein described, and though for five years nobody supposed it was intended to describe or claim such apparatus as yours, we have learned from your patents and from the good results obtained from your apparatus, that our Bull Patent can be rewritten with ingenious changes in description, and with sub-combination claims, and so have reissued it, to take away your vested rights, drive you out of the market as a competitor, and put you under tribute to us.

Though this reissued patent, obtained for such a purpose, has successfully run the gauntlet of the Patent Office and of the Circuit Court for Maryland (though not in one or two other districts), and been used for this oppressive purpose, it must fall, under the law applicable to such patents, as laid down by this Court in M'n'f'g Co. *vs.* Ladd, 102 U. S., 408; Gage *vs.* Herring, 107 U. S., 640; and numerous other cases.

2. The remarks of the learned counsel, on pages 13, 35, and 52 of appellees' brief, wherein is attempted to be given to the corporation appellee the credit for having first introduced the system into the United States; and the business circular or pamphlet of the corporation, improperly injected into the proofs as a piece of cheap advertising, should be received with caution. None of these remarks of counsel, nor the business circular, refer to the Bull apparatus; it is the Straus apparatus that is therein especially referred to, and not a line of the published praises and commendation therein contained has any reference whatever to the Bull apparatus, not one of which, so far as the records shows, was ever made or used by the appellee, excepting only in an experimental way to enable Mr. Renwick to testify concerning it, and then with such modifications (see his testimony, x-ex., 53, 54, and 56, record, pages 141 and 142), making it to vary substantially from Bull's device. Care was taken by counsel, however, not to give any

credit to Bradley, one of the early directors of the corporation appellee, and its chief organizer, for contributing to it the Straus Patent, which he then owned, and which machine so largely, as it admits, contributed to its early success.

3. Perhaps it may not be necessary to the decision of this cause to refer to the proofs in connection with the acts of Bradley, but so much has been said in that respect in the appellee's brief, that it seems to properly call for a reply. The record shows that the corporation obtained from Bradley his interest in the Straus Patent—without consideration as he alleges and testifies. That they endeavored to injure him by putting in evidence the record of his conviction in New York for a criminal offence; and in the argument allege that he attempted to patent what he knew belonged to Bull. The proofs contain a full refutation of these charges. The offer of the criminal record was purely malicious; because the judgment of the lower Court was reversed in the Court of Appeals, *and this the appellee's officers well knew*, and yet offered only that part of the record showing the conviction; (see record, page 112).

Again, the record does not support the averment in the brief that Bradley was four times rejected in the Patent Office on reference to Bull. It shows that Bradley did not know of Bull's Patent when he filed his application; that the *first* rejection was on reference to Bull; the application amended and an argument filed pointing out the differences, and the subsequent rejections were mainly on reference to Scharf's Patent, which was quite proper. The Patent Office recognized the differences between Bull and Bradley, as will be seen by a glance at the files of each Patent.

Bradley's application was filed June 29, 1875; the claims, as amended July 30, 1875, were put in interference with Scharf's Patent, and decided in favor of Scharf, October 26, 1875, (contrary to the statement of counsel for appellee in brief filed—see record, page 264). The claims as finally acted on, February 4, 1876, were filed February 2, 1876, (see record,

pages 262 and 263,) and are in precise terms for the appellant's apparatus which he bought of Bradley.

It is worth while to note that this case was pending *before the same Examiner and at the same time* as the application for the Bull reissue. Bradley was allowed his combination claim, embodying the *flexible* vault pipe as an element. *This was February 4, 1876.* On January 11, 1876 (three weeks before), the Examiner had objected to the Bull reissue application, because it used the word "flexible" in reference to the induction as well as the air eduction pipe, on the ground that it was new matter (see record, page 228), and following that, on February 15, 1876, the application was amended by erasing the word "flexible," and adding a further description of the rigid funnel induction pipe (see record, page 218.)

In view of these facts can there be any doubt that the Patent Office recognized the distinction between the two devices, and recognized Bradley's right to the combination claim for the apparatus sold to appellant, and disallowed Bull's claim for the same as not being the same device shown in his Original Patent.

These dates and these records settle the question who is right —the appellee or Mr. Bradley—notwithstanding the unkind and unjust remarks of counsel concerning him, and the malice shown by appellee's officers towards him. They clearly relieve him of the base charges brought against him, and show that both the Scharf and the Bradley Patents were allowed, the former more than a year and the latter several weeks, before the Bull reissue was finally acted on, and which latter was not permitted to issue until it was stripped of language which would make it conflict with the Scharf Patent of January 12, 1875, and the Bradley claim which has just been allowed— both cases having been passed upon by the same Examiner, and brought to his attention at the same time, and the Scharf Patent being before him in the interference with the Bradley application. The former was sustained, as the record shows (notwithstanding

the averment of counsel to the contrary). The Bradley Patent is subject to the prior Scharf Patent, and is stated in the specification to be an improvement upon the Scharf machine. Mr. Bradley owns an interest in both, and the evidence and the models show that the appellant's apparatus was made under and in accordance with both.

4. Elaborate argument, covering six pages, is contained in appellee's brief in the endeavor to show when Mr. Bradley first sold any apparatus made in accordance with the Scharf and Bradley Patents; though for what purpose is not understood, unless it be in the vain endeavor to show that the general public and users had acquired no rights prior to the reissue of the Bull Patent; but in this conclusion, counsel is mistaken; the weight of the evidence is against the proposition. But it is not material, as Scharf had acquired a right by virtue of his Patent granted nearly a year before, and Bradley had acquired a right by virtue of his application filed in June, 1875, four months before the appellees bought up the Bull Original Patent, or had any interest in it. Frazier had acquired a right, and had made and sold a machine to Wrightson, in Baltimore, early in 1875, (record, page 115.) But Bradley had also put them into the market, and sold some of them in Baltimore as early as the summer of 1875, (see 13th and 14th Interrogatories—record, page 109.) The record does not support the broad averments contained at top of page 9 of appellees' brief; and there is not a scintilla of proof that a single Bull apparatus was made or put into use by the appelleee, or any one else, except experimentally in one or two instances.

The more reasonable conclusion from the whole evidence is that the dates given by Bradley and Wrightson are correct; for the record shows that, although the corporation appellee had been in the business then for some time, it was not until August, 1875, that its President, Mr. Keizer, obtained title to the Bull Original Patent (probably after he had seen the Bradley and Frazier appparatus), and his first proceeding

thereon was to have a reissue application prepared, and with it, in the Fall of 1875, proceeded to New York to hunt up Bull, the patentee, to sign and swear to the papers (see record, page 101).

In view, also, of the fact that the reissue specification contains peculiar phraseology found in the prior Scharf Patent of January 12, 1875, is it not reasonable to suppose that this patent had been examined and carefully studied *prior* to the preparation of the Bull reissue application; attention being probably called thereto by the first machines made by Bradley under it.